Supreme Court, U.S.
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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JAMES BARLOW FAMILY LIMITED PARTNERSHIP, ET AL.,

Petitioners,

v.

DAVID M. MUNSON, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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February 10, 1998

10 pp

QUESTIONS PRESENTED

1. Whether, as a matter of federal common law, a court may construe a settlement agreement so as to contravene the express language of the agreement and the intent of the settling parties.

2. Whether a mineral patent issued pursuant to the 1872 General Mining Law, 30 U.S.C. § 22 *et seq.*, automatically relates back to the date of the discovery of the claim, regardless of the equities and circumstances involved.

PARTIES TO THE PROCEEDINGS

Parties before the Court of Appeals were the James Barlow Family Limited Partnership, the John and Lois Haun Family Partnership, Barlow & Haun, Inc., L.A. McPeek and Company, Barbara Crews, B.J. Bradshaw Estate, by First Interstate Bank of Utah as Trustee, Alpha Exploration, Inc., and Chevron U.S.A., Inc. as appellees; and David M. Munson, Inc. as appellant. The United States filed an amicus curiae brief on behalf of the appellees below.

RULE 29.6 LISTING

The parent and nonwholly owned subsidiaries of Chevron U.S.A., Inc. are: Chevron Corporation, Chevron Canada Enterprises Limited, Chevron Canada Finance Limited, Chevron Capital U.S.A., Inc., Chevron Chemical Company, Chevron Oil Finance Company, Chevron Transport Corporation, Felix Oil Company, and Kewanee Industries, Inc. The other corporate entities among petitioners (Barlow & Haun, Inc. and Alpha Exploration, Inc.) have no parent or nonwholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

James Barlow Family Limited Partnership, *et al.* (the "Barlows") respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is not yet officially reported and is included in the appendix at App. 1a to 15a. The opinion of the United States District Court for the District of Colorado is not officially reported. It is included in the appendix at App. 16a to 28a.

JURISDICTION

The opinion of the Court of Appeals was originally entered on August 26, 1997. The Barlows filed a timely petition for rehearing on September 9, 1997. On November 12, 1997, the Court of Appeals granted the petition for rehearing in part and issued a revised opinion. The Court of Appeals issued a second revised opinion on December 15, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Although two statutes are relevant to the background of this case (the General Mining Law of 1872, 30 U.S.C. § 22 *et seq.*, and the Mineral Leasing Act, 30 U.S.C. § 181 *et seq.)*, this case does not turn on statutory provisions. Instead, it turns on principles of federal common law governing settlement agreements and on a proper interpretation of this Court's decision in United States v. Detroit Timber & Lumber Co., 200 U.S. 321 (1906), regarding the doctrine of "relation back."

STATEMENT OF THE CASE

The Tenth Circuit's decision raises critical questions about the validity and enforceability of the settlement of one of the most protracted and complex natural resources cases ever litigated in this country: the oil shale litigation. For over 20 years, the United States and private claimants fought bitterly over the validity of oil shale claims on the federal public lands. Twice the litigation reached this Court. Andrus v. Shell Oil Co., 446 U.S. 657 (1980); Hickel v. Oil Shale Corp., 400 U.S. 48 (1970). In 1986, while the litigation was pending in the Tenth Circuit, the parties entered into a settlement agreement ending their long-standing dispute. Now, 11 years later, in a case involving parties in privity with the settling parties, the Tenth Circuit has refused to give effect to key provisions of the settlement agreement and expressly declined to honor the clear intent of the settling parties. The Tenth Circuit's decision is a radical departure from the law of other Circuits, and threatens to undermine well-settled principles supporting the enforcement of settlement agreements.

A. Background of the Oil Shale Litigation

Before February 25, 1920, one could obtain private rights to oil shale on federal lands by locating and maintaining a mining claim under the General Mining Law of 1872, 30 U.S.C. § 22 *et seq*. The location and maintenance of such a claim in accordance with the requirements of the General Mining Law entitled the claimant to apply for and receive a patent covering not only the oil shale, but also the land itself and its associated resources, including oil, gas, and coal. See generally Andrus, 446 U.S. at 658-66. Congress then passed the Mineral Leasing Act or 1920, 30 U.S.C. § 181 *et seq*., which completely changed national policy concerning the disposition of oil shale on federal lands. Beginning on February 25, 1920, one could no longer acquire rights to oil shale by location of mining claims; instead, such rights, as well as rights to oil and gas, could only be leased from the federal government, subject to payment of royalty and other

requirements. The Mineral Leasing Act contained a "savings" clause, however, which preserved valid mining claims in existence on February 25, 1920, where those claims were validly located and thereafter maintained in compliance with the General Mining Law. 30 U.S.C. § 193.

Over the course of several decades, the federal government disputed the validity of various oil shale claims located before 1920 in western Colorado. The government contended that many of the claims were void because of the lack of a proper "discovery" and the failure to perform annual assessment work required by the General Mining Law. In 1970, this Court held that the government, pursuant to the language of the savings clause in 30 U.S.C. § 193, could refuse to issue patents to oil shale claimants and could void claims where the annual assessment work performed on them did not amount to "substantial compliance" with the General Mining Law. Hickel, 400 U.S. at 57. Subsequently, the government issued federal oil and gas leases on some of the lands where oil shale claims had been located before 1920. (The Barlows were issued some of these leases.) As a result of this Court's decision in Hickel, however, the oil shale litigation continued on remand to address "substantial compliance" and other issues.

After years of litigation following this Court's remand in Hickel, the United States District Court for the District of Colorado in 1985 issued a decision in favor of the oil shale claimants. TOSCO Corp. v. Hodel, 611 F. Supp. 1130 (D. Colo. 1985), *vacated as moot*, 826 F.2d 948 (10th Cir. 1987). The same day, the district court judge ordered the parties to "make one last effort" to try to settle the case. Stipulated Facts, Appellate App. II at 381. In 1986, while the case was on appeal to the Tenth Circuit, the parties finally reached a settlement: the United States agreed to issue patents to the claimants and the claimants agreed to "simultaneously" convey the oil, gas, and coal to the United States. See Settlement Agreement Clause 2.5, *reprinted in* District Court Order at 19a-20a n.2. (Jan. 18, 1996). The parties specifically agreed

that there would be "no temporal gap whatsoever" in the United States' ownership of the oil, gas, and coal, and that federal oil and gas leases previously issued by the Department of the Interior would be recognized as the valid leases (rather than private leases issued by the oil shale claimants). Id. at Clauses 2.5, 3.1. The conveyances under the settlement agreement were intended "not [to] affect the validity or duration of [the] existing [federal] oil and gas leases," id. at 3.1, and to give the oil shale claimants only ownership of the oil shale — not the oil and gas interest.

The State of Colorado, several members of the United States Congress, and other parties challenged the settlement, but the Tenth Circuit refused to consider those challenges. TOSCO Corp. v. Hodel, 804 F.2d 590, 592 (10th Cir. 1986) ("We have reviewed the settlement agreement with care and conclude that, although it includes executory terms, it is a final settlement of the dispute and thus moots this case, depriving us of jurisdiction ... ."). After the settlement was implemented, the Tenth Circuit dismissed the litigation and vacated the district court's decision. TOSCO Corp. v. Hodel, 826 F.2d 948 (10th Cir. 1987).

B. Background Of The Proceedings Below

In the late 1970s, David M. Munson, Inc. ("Munson") became interested in exploring for oil and gas on federal land in western Colorado. Because much of the land at that time encompassed disputed oil shale lands, and because of the pending oil shale litigation (of which Munson was aware), Munson acquired leases from both successors to the private oil shale claimants (the Tell Ertl Estate and Marathon Oil Company) and from the owners of federal oil and gas leases issued by the United States (the Barlows). In this manner, Munson sought to be protected no matter how the oil shale claim dispute was resolved. Stipulated Facts, Appellate App. II at 380. Thus, regardless of how the dispute was resolved, Munson would remain the lessee of the oil and gas interest.

There is one significant difference in the two sets of leases Munson acquired. On the federal leases, if oil or gas was produced, Munson would pay not only a standard 12.5 percent royalty to the United States, but also an overriding royalty to the Barlows. This overriding royalty was the consideration Munson paid to acquire the federal leases.

In 1980, Munson discovered gas. Pursuant to a unit agreement with the Barlows, Munson exercised his right to hold in escrow the royalty payments due the Barlows pending resolution of the oil shale litigation. In 1987, however, after the settlement agreement recognizing the validity of the federal leases was signed, and after the litigation was dismissed, Munson refused to pay the Barlows their royalty interest under the federal leases. Munson claimed that the federal leases were invalid despite the express terms of the settlement agreement.

In 1992, the Barlows filed this action in the United States District Court for the District of Colorado to collect royalties under the federal leases specifically preserved by the oil shale settlement agreement. The jurisdiction of the district court was invoked under 28 U.S.C. § 1332 because the amount in controversy exceeded $50,000 and because the parties were citizens of different states, the plaintiffs being residents of Colorado, Wyoming, Utah, Pennsylvania and California, and the defendant being a resident of Texas. On January 18, 1996, the district court granted summary judgment in favor of the Barlows. The district court found that the settlement agreement effectively preserved the federal leases and that Munson, as a party in privity with the settling parties (the Ertls and Marathon), was bound by the settlement. District Court Order at 24a-26a. The district court then entered judgment in the Barlows' favor in the amount of approximately $470,000.

On August 26, 1997, the Tenth Circuit reversed the district court's order and granted summary judgment in favor of Munson. The Tenth Circuit held that the settlement reached between the United States and the oil shale claimants was ineffective to preserve the federal leases. It reasoned that

issuance of the patents pursuant to the settlement necessarily "related back" to the date of the original mining claims (before 1920), and that the effect of relation back was to extinguish the federal leases and validate the private leases. As to the provisions of the settlement that provided for a "simultaneous" conveyance of the oil and gas interest to the United States, no temporal gap in the government's ownership of the oil and gas, and preservation of the federal leases, the court called them a "fiction" and "simply not legally effective." Tenth Circuit Opinion at 8a-9a (Dec. 15, 1997). The court reached this conclusion despite the express terms of the settlement agreement and "notwithstanding the intent of the settling parties." Id. at 9a. Because the court concluded that there were no remaining factual issues, the court entered summary judgment in favor of Munson.

On November 12, 1997, the Tenth Circuit granted in part the Barlows' petition for rehearing. Tenth Circuit Order at 44a-45a (Nov. 12, 1997). In its revised opinion on that same date, the court maintained its reversal of the district court's grant of summary judgment in favor of the Barlows, but withdrew its grant of summary judgment in favor of Munson and remanded the case "for further proceedings to resolve outstanding issues if any remain." Id. at 46a. In doing so, the court implicitly acknowledged the Barlows' rehearing argument that there remained a distinct and unresolved estoppel issue that the district court should consider on remand. Subsequently, on December 15, 1997, the Tenth Circuit granted the Barlows' motion to clarify the revised opinion and issued a second revised opinion removing statements in the opinion that were inconsistent with its remand order. See Tenth Circuit Order at 46a-47a (Dec. 15, 1997). Despite the Tenth Circuit's remand of the case, the district court entered summary judgment for Munson on December 5, 1997. The Barlows filed a timely motion to reconsider pursuant to Federal Rule of Civil Procedure 59(e); that motion is currently pending in the district court.

REASONS FOR GRANTING THE WRIT

A. The Tenth Circuit's Decision To Invalidate Key Provisions of The Settlement Agreement Conflicts With The Federal Common Law Principle That A Court Should Construe A Settlement To Give Effect To Its Express Terms And The Intent Of The Settling Parties.

The critical question is whether the oil shale settlement agreement preserved the federal leases that the Barlows assigned to Munson, subject to payment of an overriding royalty interest. Because the United States is a party to the settlement agreement, which was entered into pursuant to federal law, federal common law controls the interpretation of that contract. United States v. Seckinger, 397 U.S. 203, 209-10 (1970).

When the Tenth Circuit interpreted the settlement agreement in a manner that invalidated its very terms, it violated a basic principle of federal common law: Settlement agreements should be construed to give effect to the terms of the agreement and the intent of the settling parties. The effect of the Tenth Circuit's decision is to deprive the United States of a key consideration it received in the oil shale settlement. The decision invalidates not only the five federal leases in which the Barlows have royalty interests, but also more than 30 other leases preserved by the settlement. See Appellate App. I at 182-84. More significantly than the effects in this case, however, the Tenth Circuit's decision sets a dangerous precedent that threatens to undermine the finality and enforceability of settlement agreements generally.

It is a well-settled principle of federal common law that a settlement agreement, as a contract, should be interpreted in accordance with the intent of the parties as expressed through the terms of the agreement. Greco v. Department of the Army, 852 F.2d 558, 560 (Fed. Cir. 1988). See also Devils Lake Sioux Tribe v. North Dakota, 917 F.2d 1049, 1055 (8th Cir. 1990) ("[T]he court's objective in interpreting a settlement

agreement is to ascertain the actual intent of the parties at the time they executed it."); NRM Corp. v. Hercules, Inc., 758 F.2d 676, 681 (D.C. Cir. 1985) ("[T]he judicial task in construing a contract is to give effect to the mutual intention of the parties."); Brown v. General Motors Corp., 722 F.2d 1009, 1012 (2d Cir. 1983) ("In any case involving a settlement of litigation, it is the intent of the parties which governs ... ."). Furthermore, as a basic canon of construction, a court should endeavor to interpret contractual language to uphold the validity of the agreement. Consul Ltd. v. Solide Enterprises, Inc., 802 F. 2d 1143, 1149 (9th Cir. 1986)

The basis for this strict rule governing the interpretation of settlement agreements is the prevailing public policy that courts should encourage and promote the compromise of litigation through settlement. See McDermott, Inc. v. Am-Clyde, 511 U.S. 202, 213-15 (1994) ("Public policy wisely encourages settlements."); Marek v. Chesny, 473 U.S. 1, 10 (1985) ("In short, settlements rather than litigation will serve the interests of plaintiffs as well as defendants."); Williams v. First Nat'l Bank, 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts."). In fact, this Court has gone so far as to reverse decisions where the lower federal courts failed to give proper weight to the "strong policy" favoring the non-judicial settlement of disputes. Airline Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 78 (1991); Carson v. American Brands, Inc., 450 U.S. 79, 89 (1981) (holding that the district court's refusal to approve a consent decree deprived the parties of the "benefits of the settlement agreement they negotiated").

Prior to the decision of the Tenth Circuit below, the courts of appeal had uniformly recognized the overwhelming importance of settlement agreements to our judicial system. As the Third Circuit recently noted: "Settlement agreements are encouraged as a matter of public policy because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the courts." D.R. by M.R. v. East Brunswick Bd. of Educ., 109 F.3d 896, 901 (3rd

Cir.), *cert. denied*, 118 S.Ct. 415 (1997); see also Janneh v. GAF Corp., 887 F.2d 432, 435 (2nd Cir. 1989) (noting that the "bargained-for right to avoid trial" by enforcing a settlement agreement "implicates our nation's strong judicial and public policies favoring out-of-court settlement"); American Sec. Vanlines, Inc. v. Gallagher, 782 F.2d 1056, 1060 (D.C. Cir. 1986) ("[F]ew public policies are as well established as the principle that courts should favor voluntary settlements of litigation by parties to a dispute."); Hemstreet v. Spiegel, Inc., 851 F.2d 348, 350 (Fed. Cir. 1988) ("The law strongly favors settlement of litigation, and there is a compelling public interest and policy in upholding and enforcing settlement agreements voluntarily entered into.").

The Tenth Circuit's invalidation of the federal leases based upon its interpretation of the oil shale settlement agreement directly contravenes this well-developed federal law governing settlement agreements. The Court of Appeals itself acknowledged that the clear intent of the settling parties as expressed through their agreement was to preserve the federal leases through the federal government's issuance of patents to the oil shale claimants and the claimants' simultaneous reconveyance of the oil, gas, and coal back to the federal government. See Tenth Circuit Opinion at 6a. Yet the Court declined to follow the express terms and intent of the settlement agreement.

The Tenth Circuit's decision discourages the settlement of litigation by undermining the finality of agreements achieved by litigants. The public policy favoring the finality of judgments entered on settlements is at least as strong as the policy regarding the finality of judgments entered on a trial verdict. A settlement agreement is "as binding, conclusive, and final as if it had been incorporated into a judgment. . . ." Bostick Foundry Co. v. Lindberg, 797 F.2d 280, 283 (6th Cir. 1986). As a matter of immediate concern, the Tenth Circuit's decision retroactively threatens the finality of any settlement that released claims in favor of the rights secured by the agreement. See McClesky v. Zant, 499 U.S. 467, 493 (1991)

(noting "the law's interest in finality"). The Tenth Circuit's decision opens the door to manipulation by persons who, as in this case, sit by during the course of settlement negotiations (with full knowledge of those negotiations) and then, after the consummation of a settlement agreement, challenge that agreement in federal court. This threat is not confined to mining litigation. The Tenth Circuit's decision invites collateral attacks on any case in which the parties released claims within the jurisdiction of the federal courts.

B. The Tenth Circuit's Conclusion That A Patent Automatically "Relates Back," Regardless Of The Equities and Circumstances Involved, Conflicts With This Court's Precedent.

The Tenth Circuit's rationale for declining to follow the terms and intent of the parties to the settlement agreement is that equitable principles of "general mining law" — in particular, the "relation back" doctrine — necessarily invalidated the federal leases once the patents were issued. The Tenth Circuit's analysis is: (1) under general mining law, the patents related back to before 1920, when the claims were located (thus giving the oil shale claimants title to the oil, gas, and other minerals as of that date); (2) the provision in the settlement agreement calling for the oil shale claimants to "simultaneously" convey the oil, gas, and coal back to the United States was a "fiction," and the oil shale claimants at least "momentarily" held legal title; and (3) because the oil shale claimants' held full legal title for at least an instant, the leases they issued to Munson in 1977, not the leases issued by the United States in the early 1970s, are the valid leases. The Tenth Circuit's analysis conflicts directly with this Court's precedent and should be overturned.

1. The Oil Shale Litigation Was Not An Ordinary Mining Law Case.

Every case cited by the Tenth Circuit in its opinion addresses the effect of a mining claim that is unquestionably valid and properly maintained under the mining law, and the

effect of a patent issued for such a claim. See United States v. Etcheverry, 230 F.2d 193, 195 (10th Cir. 1956) (mining claim "perfected under the law"); Union Oil Co. of Cal. v. Udall, 289 F.2d 790, 791 n.1 (D.C. Cir. 1961) (a "valid" claim); Reed v. Munn, 148 F. 737, 757 (8th Cir. 1906) ("valid location of mining claim" and performance of "required amount of work"). The Tenth Circuit repeatedly describes these rules as applying in the "normal" or "ordinary" case.

The oil shale litigation was decidedly not the normal, ordinary mining law case. For decades, the United States maintained that the oil shale claims in question were not validly located or properly maintained as required by the General Mining Law. In 1970, this Court upheld the government's position that it could refuse to issue patents and could void oil shale claims where the assessment work performed did not amount to "substantial compliance" with the General Mining Law. Hickel, 400 U.S. at 57. Rather than litigate the assessment work and other issues for these claims to a time-consuming, expensive, and unknown conclusion, the parties decided to settle.

Thus, unlike the ordinary case, the parties settled the very issue of claim validity, providing for issuance of patents and a conveyance to the United States under terms drafted to preserve existing federal leases. As a result, the rules from mining law cases on what happens when claims are indisputably valid simply do not apply. See United States v. ITT Continental Baking Co., 420 U.S. 223, 235-36 (1975) (A settlement "must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.") .

2. The "Relation Back" Doctrine Should Not Be Applied Where The Parties To The Settlement, Under Which the Patents Were Issued, Did Not Intend It To Apply.

In declaring that a patent automatically relates back in time to the date of location of a mining claim, no matter what

the circumstances or the provisions of a settlement, the Tenth Circuit misapprehends this Court's precedent concerning the relation back doctrine. Relation back is an equitable doctrine applicable only where justice requires, not a rule of law that attaches to every patent regardless of the circumstances. Where, as here, the equities counsel against relation back, it does not apply.

The Tenth Circuit's opinion relies on a quote from United States v. Etcheverry, 230 F.2d 193, 196 (10th Cir. 1956), which itself is a quote from United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 334-35 (1906): "A patent from the United States operates to transfer the title, not merely from the date of the patent, but from the inception of the equitable right upon which it is based." Tenth Circuit Opinion at 8a. The Tenth Circuit omits from its quote an earlier sentence in the Supreme Court's decision in Detroit Timber. There this Court explained the doctrine of relation back as a "fiction of law ... resorted to whenever justice requires." Detroit Timber, 200 U.S. at 334; see also Etcheverry, 230 F.2d at 196. Therefore, relation back is an equitable doctrine applied where the facts of a particular case so require; it is not a rule of law that requires all patents to relate back, no matter what the circumstances. See United States v. 62.57 Acres of Land in Yuma County, Arizona, 449 F.2d 5, 7-8 (9th Cir. 1971) (declining to apply the relation back doctrine in determining the date claimant acquired legal title to the relevant property).

In Etcheverry, the Tenth Circuit examined the facts and the equities before concluding that relation back should apply. Etcheverry, 230 F.2d at 197 ("Under the facts of this case, it would not serve the purpose of justice to permit the United States to recover damages for the grazing of grass on lands which the owner of a valid claim had an unquestioned right to purchase, where he has later exercised his right and received the fee title."). Since relation back is not required by statute — nothing in the General Mining Law even mentions the term — the United States and the oil shale claimants were free to enter into a settlement agreement that effectively negated the

potential consequences of the relation back doctrine. This is particularly true here, where Munson acquired leases from the oil shale claimants with full knowledge of the litigation (Appellate App. I at 254), knew the settlement terms one year in advance (id. at 272), understood that they would validate the federal leases (id.), and never objected until after the settlement was implemented and the litigation dismissed (id. at 288). Where, as here, a court of appeals has relied upon the relation back doctrine to invalidate a settlement agreement, the Court should grant review to reaffirm its holding in Detroit Timber and to ensure that this equitable doctrine is not mechanically applied in all mineral patent cases.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 96-1202

JAMES BARLOW FAMILY LIMITED PARTNERSHIP; JOHN AND LOIS HAUN FAMILY PARTNERSHIP; BARLOW & HAUN, INC.; L.A. MCPEEK AND COMPANY; BARBARA B. CREWS; B.J. BRADSHAW ESTATE, by First Interstate Bank of Utah, Trustee; ALPHA EXPLORATION, INC.; CHEVRON U.S.A., INC.,	)
Plaintiffs-Appellees,	)
vs.	)
DAVID M. MUNSON, INC.,	)
Defendant-Appellant	)
----------	)
UNITED STATES OF AMERICA,	)
Amicus Curiae.	)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. NO. 92-D-1817)

Craig R. Carver of Alfers & Carver, LLC, Denver, Colorado, for Defendant-Appellant.

John F. Shepherd (Jane L. Montgomery with him on the brief) of Holland & Hart LLP, Denver, Colorado, for Plaintiffs-Appellees.

Peter Coppelman, Acting Assistant Attorney General; Robert L. Klarquist, Gerald L. Fish, and Jacques B. Gelin, Attorneys, Department of Justice, Environment and Natural Resources Division; and Karen Hawbecker, Of Counsel, Office of the Solicitor, Department of the Interior, Washington, D.C., on the brief for Amicus Curiae.

BEFORE SEYMOUR, CHIEF JUDGE, AND HENRY, AND BRISCOE, CIRCUIT JUDGES.

SEYMOUR, Chief Judge.

This action involves a dispute between the Barlow Family Limited Partnership and others (the Barlows), owners of overriding royalty interests in certain federal oil and gas leases located in western Colorado, and David M. Munson, Inc. (Munson), as lessee and operator, over whether the Barlows are entitled to royalty payments from the federal leases. On cross motions for summary judgment, the district court held in favor of the Barlows. On Munson's appeal, we reverse and remand.

I.

The leases at issue in this case cover federal lands in western Colorado on which unpatented oil shale claims were located. For many years, oil shale claimants and the Department of the Interior were involved in disputes over the claimants' rights to mineral patents on these and other lands where oil shale claims were located. See generally Tosco

Corp. v. Hodel, 611 F. Supp. 1130, 1145-56 (D. Colo. 1985) (discussing background of oil shale disputes). The government contended that many oil shale claims were void for lack of valid discovery and for failure of the claimants to perform required annual assessment work. It therefore refused to issue mineral patents to the subject lands. A title dispute ensued in which the oil shale claimants sued the federal government seeking to compel issuance of mineral patents. Id. Tosco claimants); Marathon Oil Co. v. Lujan, 751 F. Supp. 1454 (D. Colo. 1990) (Marathon claimants); Ertl v. Hodel, No. 86-M-764 (D. Colo. Filed Apr. 18, 1986) (Ertl claimants) (rec., vol. II at 382). Since the mineral claims were staked prior to 1920, the claims would, if valid, entitle the claim holders to patents including all minerals on the lands. See United States v. Etcheverry, 230 F.3d 193, 195-96 (10th Cir. 1956); Union Oil Co. of Cal. V. Udall, 289 F.2d 790, 791 n.1 (D.C. Cir. 1961).

Notwithstanding the ongoing title dispute, the government issued federal oil and gas leases on some of the lands which were involved in oil shale disputes. The Barlows (or their predecessors-in-interest) acquired in the early 1970s federal leases which were subject to outstanding oil shale claims.

In the late 1970s Munson became interested in exploring for oil and gas on federal land in western Colorado. Since much of the area of interest was covered by disputed oil shale claims, Munson was uncertain how to lease oil and gas rights. Faced with this uncertainty of title, Munson prudently acquired both private and federal oil and gas leases. Munson acquired the private leases from the estate of Tell Ertl and others (Ertl), and from Marathon Oil Company, both of which were successors in interest to oil shale claimants. Munson acquired duplicative federal oil and gas leases by assignment from the Barlows.. Under the parallel lease scheme, Munson secured its right to drill for and to produce oil and gas regardless of whether the private or the federal claims ultimately prevailed in the title dispute.

Munson also protected itself from duplicative royalty payments under the private and federal leases. The terms of the private leases provided that Munson would pay the lessors royalty for one year: if title remained unresolved after expiration of that year, Munson would, at its option, pay royalty only to the federal government pending final resolution of the title dispute. In addition, the federal unit operating agreement under which oil and gas was produced permitted Munson to hold in suspense payments of royalties due unit members until settlement of any title disputes.

There is one significant difference between the private and federal leases acquired by Munson. On the federal leases, Munson would pay not only a standard 12.5% royalty to the United States, but also a 5.8% to 11.25% overriding royalty to the Barlows which they retained as consideration for the assignment. On the private leases, however, Munson would pay only a 12.5% royalty to Ertl and to Marathon. Because its royalty burden is less under the private leases, it is in Munson's interest to have the private leases validated.

Munson discovered gas on the leases in 1980. Since the beginning of production, Munson has exercised its right under clause 27 of the unit operating agreement, to hold in escrow the royalty payments potentially due the Barlows pending resolution of the Barlows' and Munson's competing claims to royalty payments.

The oil shale disputes were eventually settled. See Tosco Corp. v. Hodel, 826 F.2d 948 (10th Cir. 1987) (dismissing as moot the Tosco claimants' cases); Marathon Oil Co. v. Lujan, 771 F. Supp. 1556 (D. Colo. 1991) (closing Marathon case upon issuance of patent to Marathon); rec., vol. II at 384 (describing district court dismissal of the Ertl action). The Barlows contend that the settlements validated their federal leases, that Munson's conduct binds it to the contractual terms of the settlement agreements, and that any assertion of rights under the private leases constitutes an impermissible collateral attack on the validity of the settlements. Munson argues that

the settlements resulted in the issuance of federal mineral patents to the oil shale claimants which, under the canons of general mining law, validated its private leases and voided the federal leases. The Barlows and Munson brought cross motions for summary judgment. The district court granted summary judgment for the Barlows and ordered Munson to pay to the Barlows the royalty payments held in suspense.

II.

We review the district court's grant of summary judgment de novo, Ellis v. United Airlines Inc., 73 F.3d 999, 1003 (10th Cir.), cert. denied, 116 S. Ct. 2500 (1996), applying the same legal standard used by the district court under Fed. R. Civ. P. 56(c). Summary judgment should not be granted unless the evidence, viewed in the light most favorable to the party opposing the motion, shows there are no genuine issues of material fact and the moving party is due judgment as a matter of law. Harrison Western Corp. v. Gulf Oil Co., 662 F.2d 690, 691-92 (10th Cir. 1981). Where, as here, the parties file cross motions for summary judgment, we are entitled to assume that no evidence needs to be considered other than that filed by the parties, but summary judgment is nevertheless inappropriate if disputes remain as to material facts. Id. at 692.

We begin our analysis by reviewing and analyzing the settlement agreements to which Munson is alleged to be bound.

A. Settlement Agreements

1. United States/Ertl Settlement Agreement

On August 4, 1986, Ertl entered into a settlement agreement with the United States. Rec., vol. II at 390 (Agreement To Settle Pending Litigation Between The United States And The Owners Of Certain Oil Shale Mining Claims In Colorado)[1] In order for the claimants to be able to exploit oil

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[1] The Ertl settlement agreement is identical to that reached by the Tosco claimants. Ertl was not part of the Tosco law

shale while the United States retained the right to oil, gas and coal currently under federal lease, the United States agreed to grant the claim owners all minerals except oil, gas and coal. The United States attempted to effectuate the agreement by issuing to the claim owners standard mining claim patents in return for the claim owners' "simultaneous" conveyance by special warranty deed of all oil, gas and coal within the claims. The parties intended that the issuance of the patent and the reconveyance of the oil, gas and coal should "occur precisely simultaneously, with no temporal gap whatsoever in ownership by the United States of interests it retains." Id. at 399. The conveyances under the settlement agreement were intended "not [to]affect the validity or duration of [the] existing [federal] oil and gas leases." Id at 400. On November 7, 1986, Ertl was issued mineral patents covering its claims. By warranty deed signed by the relevant parties between September 18 and November 7, 1986, Ertl conveyed to the United States oil, gas and coal.

2. United States/Marathon Settlement Agreement

Marathon independently reached a settlement with the United States on June 28, 1991. Id. at 242. Their agreement stipulates that Marathon has met all requirements to receive a patent and that the United States will issue a patent without reservation to Marathon. The parties agree that, pending a land exchange, an agent would hold the patent until June 28, 1994, and then release the patent to Marathon. During the time the agent held the patent, the parties agreed that the federal oil and gas leases on the subject lands would remain in

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(cont'd.)..
suit because its claims were still in administrative appeal during the pendency of that case. By the time the Tosco settlement negotiations were instituted, the Ertl administrative appeals had run their course and Ertl had filed suit in district court. Since the Ertl claims were identical to those of the Tosco claimants, Ertl joined in the Tosco settlement negotiations. This agreement is the result of those negotiations.

effect. A patent was issued to Marathon on June 29, 1991. Although the language employed in the Marathon settlement is different from that used in the Ertl settlement, the intent is similar. For at least some period of time, the parties intended that, notwithstanding delivery of an unreserved patent, the federal leases would be held to be in full force and effect.[2]

3. Effect of the Conveyances Pursuant to the Settlement Agreements

Despite the intent of the parties, the instruments of title executed pursuant to the settlements do not effectively preserve the federal leases. The patents were issued without reservation of oil, gas and coal. The Ertl settlement agreement specifically describes the patent to be issued as a standard mining patent:

> 2.3 The form of the patents to be issued by the Department of the Interior to the Claimowners shall be that of a *standard mining claim patent* granting the Claimowners *fee ownership of the entire claim*, subject only to a right-of-way thereon for ditches and canals constructed by the authority of the United States, pursuant to the Act of August 30, 1890 (43 U.S.C. 945).

Rec., vol. II at 397-98 (emphasis added).

The rights accorded holders of such unreserved patents are clear:

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[2] The district court held that Munson was bound by the United States/Marathon settlement until June 28, 1994, at which time a patent was delivered to which general mining law applied. The court therefore held that in 1994, Marathon (and Munson through its derivative rights) had an ordinary patent which did not preserve the federal oil and gas leases. Rec., vol. II at 739.

> [W]hen a mining claim has been perfected under the law, it is in effect a grant from the United States of the exclusive right of possession to the same. It constitutes property to its fullest extent, and is real property subject to be sold, transferred, mortgaged, taxed, and inherited without infringing any right or title of the United States.

Etcheverry, 230 F.2d at 195. Upon issuance of a patent, title *relates back* to the date of original entry. Id. at 196. "'A patent from the United States operates to transfer the title, not merely from the date of the patent, but from the inception of the equitable right upon which it is based.'" Id. (quoting United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 334-35 (1906)). The consequence of relation back is that the claimant's rights and those of the claimant's assignee date from the time the claim was made, not from the time the patent was issued. Reed v. Munn, 148 F. 737, 757 (8th Cir. 1906). Under general mining law, the issuance of federal mineral patents to Ertl and to Marathon related back to the date of the original clam and validated the private leases conveyed to Munson prior to the execution of the settlements or the issuance of the patents. See id. Moreover, the issuance of patents to holders of valid mining claims ordinarily voids federal leases. See, e.g. Union Oil Co. of Cal., 289 F.2d at 791 n.1 (federal oil and gas leases issued pursuant to the Mineral Leasing Act of 1920 not valid if the holder of a valid mining claim subsequently receives a patent); 1 ROCKY MTN. MIN L. FOUND., LAW OF FEDERAL OIL AND GAS LEASES § 3.10 (1996); cf. Letter from Thomas L. Sansonetti, Associate Solicitor, Energy and Resources, United States Dep't of the Interior, to Assistant Secretary, Land and Minerals Management, United States Dep't of the Interior (Feb. 23, 1989) (rec., vol. I at 293).

Because Munson's rights under the Marathon lease relate back, the issuance of the Marathon patent voided the federal leases, regardless whether the patent is considered to have issued in 1991 or 1994. Thus, contrary to the district court's

conclusion, rec., vol. II at 739, delivery of the patent to an agent was not effective to preserve the federal leases. Similarly, the fiction engaged in by Ertl and the United States that the patent issuance and the warranty deed were executed simultaneously so as to preserve the federal leases and to cut off Munson's rights under the private leases is simply not legally effective. Despite the recitals of the settlement, the conveyances could not be made simultaneously. Ertl must have received a patent before it could deed oil, gas and coal to the government. As the special warranty deed acknowledges, Ertl could not convey title to oil, gas and coal unless Ertl at least momentarily held legal title. This title held by Ertl related back, and thus validated Ertl's lease to Munson. When Ertl did make the conveyance, it conveyed to the government only what it had at the time it signed the deed: rights to oil, gas and coal encumbered by a lease to Munson.

We hold that the instruments of conveyance employed to effectuate the Ertl and Marathon settlements did not cut off the rights of Munson under the private leases, notwithstanding the intent of the settling parties. Ordinarily, we would therefore conclude under general mining law that Munson has no obligation to pay the Barlows royalty on leases voided by the issuance of patents. The Barlows argue, however, and the district court held, that Munson is barred for other reasons from asserting the validity of its private leases. We address these arguments in turn.

B. Collateral Attack

The Barlows and the United States contend that Munson's attempt to assert its rights under the private leases is an impermissible collateral attack on the validity of the settlement agreements. They assert Munson knew of the ongoing settlement negotiations, chose not to participate in them, and thereby waived its rights, much as those who chose not to participate in the original Tosco litigation did by failing to timely intervene in that case. Tosco Corp. v. Hodel, 805 F.2d 590, 592 (10th Cir. 1986). Moreover, the United States

claims Munson's attack on the validity of the settlements contravenes the power of the attorney general to settle litigation in whatever manner he considers efficacious. We disagree with both of these propositions.

Munson is attempting to enforce the legal effect of the instruments of title executed pursuant to the settlement agreements. As we have concluded, the normal effect of these instruments would be to validate Munson's rights. Munson's assertion of its rights in this proceeding, rather than in the settlement negotiations, would constitute an impermissible collateral attack only if Munson—despite being a nonsignatory—is by reason of his conduct bound by the terms of the *settlement agreements* themselves, rather than by the instruments of conveyance. We conclude, infra part C, that it is not so bound.

Nor does this case derogate the right of the federal government to settle litigation. The government chose to settle the oil shale litigation by issuing patents. The patents were instruments of title with a particular legal significance, which would ordinarily conclusively determine the priority of Munson's private leases despite the agreement of the Ertls and Marathon to the contrary. The attorney general's power to settle litigation does not allow the United States to avoid the legal effect of the documents executed pursuant to its chosen manner of settlement. The government and the Barlows could have secured the result they now seek by requiring that Munson assign its private leases back to the Ertls and to Marathon prior to the execution of the settlement agreements.

C. Munson's Conduct

The Barlows contend Munson's conduct, evidenced in written letters, memoranda and contracts, indicates Munson's intention to be bound by all the terms and conditions of the United States/Ertl Settlement Agreement. These documents, they assert, estop Munson from claiming the validity of the private leases by operation of ordinary principles of mining law, or constitute waiver of its rights thereunder. When

reviewing this evidence, the district court focused on whether the documents support the conclusion that Munson knew of the ongoing settlement negotiations. We agree the documents do support such an inference. We disagree, however, that the documents reveal the expression by Munson of any intent regarding the relevant question: whether Munson intended to give up its right to assert the priority of the private leases should the settlements result in their validation. We consider each type of documentary evidence in turn.

1. Letters/Memoranda

a) Pre-Lease Negotiation Letters

Before Munson acquired either private or federal leases, it entered into negotiations with Ertl for acquisition of the right to drill and produce oil and gas on land subject to the Ertl oil shale claims. In the first of those negotiation letters, Munson expressed a desire to "be a neutral party to any claims between [Ertl] and the United States," and it proposed leasing acreage from Ertl "[t] primary term [of which] would not start until . . . [the Ertl] claims for patent had issued as to the oil and gas minerals on these lands." Rec., vol. I at 261. The second negotiation letter indicated Munson understood Ertl was willing to agree either that it would "not claim[] the oil and gas rights or that it would lease [Munson] the oil and gas rights." Id. at 264. The third negotiation letter contained a counter-offer which proposed the lease arrangement ultimately agreed to: a private lease to run parallel with any future-acquired federal leases. Id. at 265. In that letter, Munson stated its belief that such a lease arrangement "would perhaps reinforce [the Ertl] title position." Id. at 266

These letters represent preliminary negotiations regarding the issuance of oil and gas leases on the Ertl oil shale claims. They do not reflect the final agreement reached between the parties. It is the lease agreement itself which embodies the full agreement between the parties, and that document shows that Munson and Ertl ultimately rejected the previously discussed options and resolved matters through execution of an oil and

gas lease giving Munson legally protected interests in the Ertl oil shale claims. Even if the negotiations letters were relevant, they express no intent by Munson to compromise its ability to assert the validity of its private leases.

b) Memorandum to Munson's Ertl Lease File

In 1985, Munson inserted a memorandum in its Ertl lease file from which it is evident that Munson understood the government wanted to trade oil shale for oil and gas rights, and that Ertl contemplated assigning the government a substantial portion of the oil and gas royalty to secure title to the oil shale. Another similar memorandum indicates that *if* title is resolved in favor of the government, Munson will need to pay royalties presently held in suspense. Although these documents indicated Munson's general awareness of the Ertl position on securing oil shale title, they do not indicate that Munson would fail to assert the validity of its private leases, should title be resolved in a way that preserved those leases.

2. The Unit Operating Agreement.

In 1978, prior to establishing production on the leases, Munson signed a Unit Operating Agreement (UOA). The Barlows ascribe particular significance to a clause in the UOA permitting Munson to suspend royalty payments in the event of a title dispute.[3] They suggest, and the district court agreed, rec. vol. II at 737, that this clause demonstrates Munson's affirmative intent to be bound by the contractual terms of the United States/Ertl or the United States/Marathon "settlements," and by an "Agreement Not To Contest," discussed infra, rather than by the instruments of title executed pursuant to the settlement agreements.

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[3] The relevant portion of the unit operating agreement says: "In the event of a dispute as to title as to any royalty . . . payment or delivery on account thereof may be withheld without liability for interest until the dispute is finally settled . . . ." Rec., vol. I at 126.

First, we note that the unit operating agreement is a standard form unit agreement imposed by the federal government. 2 LAW OF FEDERAL OIL AND GAS LEASES § 18.02[2]. As part of the standardized form, the clause in question holds no particular significance for the oil shale disputes; rather, it is inserted in federal forms to direct payment of royalties in the event of title disputes. It is not used to prescribe the manner by which the operator of the unit may become bound to settlements.

Second, the unit agreement was signed by Munson on June 28, 1978, well before the "Agreement Not To Contest" was signed with Ertl. It therefore cannot inform us regarding ambiguities which may exist in a document executed three years later.

Finally, the language employed in the unit agreement says only that, in the event of a title dispute, the unit operator may withhold payments of royalties to any entity, other than the federal government, until such time as the dispute over who should be paid is resolved. The UOA refers to a dispute regarding proper recipients of royalties. The Barlow/Munson dispute before the court is precisely such a dispute, and it has not been settled. The UOA does not itself provide a basis upon which the settlements between the United States and Ertl and Marathon must be considered as having "settled" the Barlow/Munson dispute; the UOA merely provides that *if* the Barlow/Munson dispute is deemed settled by the Ertl and Marathon settlements, Munson must pay royalties. The unit operating dispute will not be settled until the present case is settled. The UOA in no way prevents Munson from contesting its obligation to pay royalty payments to the Barlows.

3. Munson/Ertl Agreement Not To Contest

The Barlows have identified one last document which they say indicates Munson's intent to be bound by the contractual terms of the United States/Ertl settlement agreement. On September 30, 1981, before Ertl settled with the United States and shortly after Munson acquired federal

leases by assignment from the Barlows, Munson entered into an "Agreement Not to Consent" with Ertl. In this agreement, Munson promises to neither "initiate, join in, support, defend or in any way become involved in a contest of the Claims or otherwise object to Claim Owner's right to apply for, process and receive patents from the United States of America covering the Land and the Claims." Rec., vol. I at 275. Ertl's rights as a claim owner is describe as entitling it to a right of "exclusive possession of the Land." Id. at 274. This document, in conjunction with the letters and memorandum, and a statement by Munson that it would not seek to intervene in the United States/Ertl settlement agreement because it "did not believe that its property rights would be affected and therefore saw no reason to participate," rec. vol. II at 382, suggest to the Barlows and to the district court that Munson gave up its right to assert the validity of its private leases.

We disagree. Although Munson might have been bound had Ertl acquired title to the oil and gas which did not relate back to the establishment of its mining claim, the language in the agreement does not support an inference that Munson would refrain from asserting the validity of its private leases if Ertl were to receive a standard mining patent.

We conclude that none of the documentary evidence offered by the Barlows supports the contention that Munson gave up its rights to assert the validity of its private leases upon issuance of patents to Ertl and to Marathon. Munson's knowledge of the ongoing Ertl settlement proceedings[4] is simply not relevant to the meaning the federal patents. The instruments of title ultimately executed pursuant to the agreements validated the private leases and thereby gave Munson a complete defense to the nonpayment of royalties to the Barlows.

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[4] There was no evidence submitted to support a contention that Munson was aware of or agreed to be bound by the Marathon settlement negotiations.

III.

In sum, we are convinced the evidence does not support an inference that Munson gave up its right to assert the validity of its private leases. The issuance of patents to Ertl and to Marathon fully validates Munson's private leases. Consequently, the district court erred in granting summary judgment to the Barlows.

We **REVERSE** the order of the district court granting the Barlows' motion for summary judgment and **REMAND** for further proceedings to resolve outstanding issues if any remain.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92-D-1817

JAMES BARLOW FAMILY LIMITED PARTNERSHIP, et al.,

Plaintiffs,

vs.

DAVID M. MUNSON, INC.,,

Defendant.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION:

This matter is before the Court on Magistrate Judge Pringle's Recommendation, issued July 17, 1995, in which he recommends that both parties' motions for summary judgment be denied and a trial be held. Both parties have filed timely objections to the Recommendation. Accordingly, the Court now reviews the Recommendation de novo to determine whether it is clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

II. NATURE OF CASE[1]:

This case stems from a title dispute. Specifically, during the 1960s and 1970s, and continuing through the 1980s, the

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[1] For a more detailed history of the relevant background of this case, see Magistrate Judge's Recommendation at 1-7.

federal government was engaged in litigation with certain oil shale claimants concerning the validity of oil shale mining claims located before 1920 on federally-owned lands in Western Colorado. As detailed below, this legendary litigation was called the Tosco case. The government disputed the validity of the claims which, if valid, would entitle the claimants to mineral patents for the land covered by the claims (in essence a fee simple absolute property interest). Of significance, much of the land included in the five federal oil and gas leases at issue here was also covered by these pre-1920 oil shale claims.

Faced with this uncertainty over the validity of the oil shale claims (and if valid, what the effect might be on the federal oil and gas leases), defendant Munson acquired private oil and gas leases from the Ertls and Marathon (the oil shale claimants), in addition to federal leases under which the plaintiffs own overriding royalty interests. These "double" leases insured that Munson was protected no matter who eventually prevailed in the underlying dispute over the validity of the oil shale claims. In any event, Munson would be the lessee of the oil and gas rights in question.

Furthermore, Munson's double leases had built-in provisions which protected him from having to make double lease payments while the underlying title dispute was on-going. Specifically, Munson's lease with plaintiffs contained the following provision: "In the event of a dispute as to title as to any royalty, working interest, or other interests subject thereto, payment or delivery on account thereof may be withheld without liability for interest until the dispute is finally settled." In 1980, Munson exercised his rights under this clause of the lease and in a letter to plaintiffs wrote that he was placing their overriding royalty payments "in suspense until such time as this title dispute is resolved."

As for his obligations under the oil shale claimants' parallel private leases, Munson had to pay the Ertls and Marathon royalties only in the first year of the private leases,

with no subsequent obligation to pay them unless the title dispute was resolved in the Ertls' (and Marathon's) favor, in which case Munson would pay them royalties only for production sold after resolution of the title dispute. Thus, though Munson was protected no matter who eventually prevailed in the underlying title dispute, under the double leases it was in his financial interest for the dispute to remain unresolved for as long as possible with the claimants (Ertls and Marathon) eventually prevailing. That way, Munson would effectively hold the lease royalty free during the pendency of the dispute. In contrast, if the plaintiffs eventually prevailed in the title dispute, Munson would have to repay the plaintiffs all royalties that were withheld during the pendency of the dispute.

Also of significance, on September 30, 1981, about one year after he suspended royalty payments, Munson signed an agreement with the Ertls entitled "Agreement Not to Contest." After reciting that Munson is the lessee of overlapping disputed federal and private leases, the agreement states that Munson shall not "initiate, join in, support, defend or in any way become involved in a contest of the [oil shale] claims or otherwise object to Claim Owner's right to apply for, process and receive patents from the United States of America covering the Land and the Claims." (Emphasis added). In so doing, Munson voluntarily relinquished his right to intervene in the litigation.

Turning to the resolution of the underlying title dispute, on May 1, 1985, Judge Finesilver ruled in favor of several oil shale claimants in Tosco Corp. v. Hodel, 611 F.Supp. 1130 (D. Colo. 1985). That same day Judge Finesilver issued an order stating "that counsel make one last effort to explore settlement without further appeal in this litigation." Pursuant to the order, the U.S. and the oil shale claimants began settlement negotiations.

The Tosco case did not include the Ertl or Marathon claims. The Ertl case was still in the administrative appeal

stage at the Interior Department while the Marathon case had not yet begun since Marathon did not file a complete patent application until April 4, 1986. Nonetheless, because the Ertl case raised the same issues as Tosco, and because the Ertl claims were already subject to administrative appeals, the Tosco settlement negotiations included the Ertl claims. However, since the Marathon claims were at an earlier stage in the process, the negotiations did not include Marathon.

While settlement negotiations were ongoing, the United States appealed Judge Finesilver's decision in Tosco to the Tenth Circuit Court of Appeals. At the same time, the Ertl case was winding its way through the Interior Department, which ultimately decided for the government in April 1986. The Ertls appealed the Interior Department's decision to this court. Ertl v. Hodel, No. 86-M-764 (filed April 18, 1986).

Thereafter, on August 4, 1986, while the Tosco case was still pending in the Tenth Circuit Court of Appeals and the Ertl case still pending in this Court, the United States, Tosco oil shale claimants, and the Ertls signed a settlement agreement. Under the settlement, the United States agreed to issue patents to the claimants (including the Ertls) and the claimants agreed to simultaneously convey back the oil, gas, and coal interests to the U.S. The agreement also specifically preserved the validity of the federal oil and gas leases covering the Ertl's oil shale claims.[2]

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[2] Of significance, the settlement agreement contained the following provisions:

Clause 2.3: The form of the patents to be issued by the Department of the Interior to the Claimowners shall be that of a standard mining claim patent granting the Claimowners fee ownership of the entire claim.

Clause 2.4: Simultaneously with issuance by the Department of Interior of a patent to the Claimowner(s) of each Subject Claim, such Claimowner(s) shall by special warranty deed convey to the

In essence, the settlement agreement compromised the parties' respective positions. The claimants preserved their oil shale rights while the federal government preserved its rights to the subsurface oil, gas, and coal. Munson argues that the settlement agreement is in degradation of common law and thus invalid for two reasons: (1) though the agreement states that "standard mining claim patent[s] granting the Claimowners fee ownership of the entire claim" will be issued to the claimants, other provisions of the agreement preserve the government's interest in the oil, gas, and coal which is inherently contradictory; and (2) instead of "relating back" to the date of location (i.e. 1920) as is the case with ordinary patents, the

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(cont'd.)..
Untied States all interest in the oil, gas and coal present within such claim.

Clause 2.5: The issuance of patent to the Claimowner(s) by the Department of the Interior and the conveyance by the Claimowner(s) to the United States of the subservient mineral estate in the oil, gas, and coal shall be deemed to occur precisely simultaneously, with no temporal gap whatsoever in ownership by the United States of the interests it retains.

Clause 3: The Department of the Interior has issued certain presently outstanding oil and gas leases involving lands within certain of the Subject Claims.

Clause 3.1: The patents issued and conveyances made pursuant to paragraph 2 of this Agreement shall not affect the validity or duration of such existing oil and gas leases, or in any way affect the rights granted by such leases, except as provided in Paragraph 3.3 of this Agreement. The duration of such leases shall continue to be determined by the terms of the lease and by applicable statutes, including the Mineral Leasing Act of 1920, and their implementing regulations.

Clause 3.2: The Claimowners hereby waive any right to recover rents or royalties paid to the United States prior to the date of execution of this Agreement, or accruing to the Untied States thereafter, pursuant to such existing oil and gas leases.

agreement specifies that the patents do not retroactively affect the government's interests. In other words, had the Tosco case proceeded to appeal and the Tenth Circuit affirmed Judge Finesilver's decision validating the claims, the claimants would have received patents conveying a fee simple absolute interest which related back to the date of location. Extending this hypothetical, in such a case plaintiffs' interests would have been void ab initio and Munson would not be obligated to pay plaintiffs any previous accrued royalties.

However, as described above, this did not happen. Instead, the parties negotiated the aforementioned settlement agreement, and in response, the Tenth Circuit vacated Judge Finesilver's decision as moot and dismissed the appeals as moot on August 12, 1987. See TOSCO Corp. v. Hodel, 826 F.2d 948 (10th Cir. 1987). Similarly, based on the settlement agreement, Judge Finesilver dismissed the Ertl case that had been pending on July 23, 1987.

This brings us to the present controversy. After the settlement was effectuated in 1987, plaintiffs demanded that Munson release the monies he had held in suspense accounts pending resolution of the title dispute, which was approximately $240,000. Munson refused and asserted that the federal leases under which plaintiffs' claims arose were void and therefore confer no rights on plaintiffs Barlow and Haun. Instead, Munson argues that the private leases (i.e. Ertl and Marathon) were the valid and operative leases, and since Barlow and Haun own no interest in that chain of title, its claims against Munson are invalid.

Thus, in Barlow and Haun's view, the primary issue is whether Munson agreed to be bound or is otherwise estopped from challenging the settlements that ended the oil shale litigation and preserved the federal oil and gas leases. On the other hand, in Munson's view, the primary issues are: (1) whether the United States had title to the oil and gas at the time the federal leases were issued; and (2) whether Barlow and Haun's rights *vis a vis* Munson under these federal leases

were affected by the settlement agreements between the United States and the Ertls or by the patents issued to the mining claimants by the United States.

In recommending that both parties motions for summary judgment be denied, the Magistrate Judge stated that a trial should be held on the issue of whether Munson manifested an intent to be bound by the overriding settlement agreement.

III. DISCUSSION

This is a contract case which has its roots in mining law and in fact flows from the legendary and protracted case of Tosco Corp. v. Hodel, 611 F.Supp. 1130 (D. Colo. 1985), vacated as moot, 826 F.2d 949 (10th Cir. 1987), which in one form or another spanned 60 plus years.

As noted by the Magistrate Judge, one of Munson's major contentions is that as a matter of law (i.e. general mining law), the government's issuance of patents to the oil shale claimants validates their property rights as of the date of the location of the claims and, thus, validates the private oil and gas leases issued to Munson by the claimants, notwithstanding settlement agreement provisions to the contrary. This argument, if accepted, would not only relieve Munson of any royalties owed under the federal leases during the pendency of the Tosco dispute (1980-1986), it would relieve Munson of all obligations - be they retroactive or prospective - under the federal leases.

Though not stated as such, Munson's argument is a de facto, third-party collateral attack on the legitimacy of the settlement agreement entered into by the government and the Ertls. That is, Munson would like this Court to reexamine the merits of the underlying title dispute much like Judge Finesilver did in Tosco. However, not only is a reexamination of the merits of the underlying title dispute inappropriate, it is unnecessary as well.

The principal fallacy in Munson's argument is that it proceeds from the proposition that the Ertls and Marathon (and

all the Tosco claimants) had steadfast patentable claims. However, as evidenced by the decades-long-dispute as well as Judge Finesilver's lengthy opinion, this proposition was very much in debate and contributed to the parties' decision to settle rather than have the Tenth Circuit pass judgment. I find that Munson's attempt to apply general mining law to this dispute is misplaced since it was never judicially determined whether the claimants were entitled to "regular" patents which would have voided the federal leases ab initio. Instead, the parties entered into a settlement agreement which created a hybrid patent. Consequently, Munson's attempt to bootstrap general mining law to the particulars of this dispute is inappropriate and therefore rejected. As plaintiffs put it, Munson cannot latch onto one part of the settlement – the issuance of patents – to deny the other part – the preservation of federal leases. In short, the key factor in this case is that the issuance of patents was not an adjudication of the validity of the mining claims, but rather a settlement of that very dispute.

If the United States had acted unilaterally to impose such conditions (i.e. preservation of the federal leases and no relation back), then Munson would be correct in arguing that the government acted in contravention of the Constitution, statutory authority, and case law. However, in this instance, the government did not act unilaterally, but instead acted in conformity with a settlement agreement voluntarily entered into by the mining claimants (Ertls). That is, since there was a good faith dispute as to whether the claims were valid, both parties gave something up (settled) to avoid a total loss. If, as Munson seems to argue, the Ertls had unassailable claims, then they could have refused settlement on the government's terms, continued their litigation (i.e. Tenth Circuit appeal), and, if successful, been awarded fee simple absolute claims which relate back as general mining law provides. They did not do this, and as a result, Munson's arguments regarding general mining law are misplaced. Simply stated, the question of the validity of the Ertl claims was never judicially resolved and thus the subject lands were patented not on the basis of the validity of the mining claims at issue, but on the basis of the

agreement entered into in settlement of the Tosco litigation. Accordingly, notwithstanding what general mining law provides, the sanctity of the settlement agreement cannot now be collaterally attacked by Munson, a third-party who actually signed an agreement prohibiting him from contesting "or in any way becom[ing] involved" in the underlying title dispute. Thus, just as the Magistrate Judge held, Munson cannot dispute the threshold proposition that the settlement agreements are valid. See Recommendation at 12-13 ("After reviewing the written Ertl and Marathon settlements, the Court concludes that the parties clearly and unambiguously agreed to recognize the validity of the federal oil and gas leases, and to treat them as the operative conveyances of the oil and gas mineral leasehold interests.").

However, even though the Magistrate Judge held that the settlement agreements are valid, he also held that there is a question of fact as to whether Munson, a third-party, is bound by the terms of the agreements to which he was not a part. See Recommendation at 11-12; Anderson v. Liberty Lobby, inc., 477 U.S. 242, 246 (1986); Stahl v. Sun Microsystems, Inc., 775 F.Supp. 1394, 1397 (D. Colo. 1991), aff'd, 19 F.3d 533 (10th Cir. 1994) (the existence of a contract ordinarily is a question of fact). I disagree based on the cumulative impact of three factors. First, as described in the Magistrate Judge's recommendation as well as in the plaintiff's brief for summary judgment. Munson's actions demonstrate an intent to be bound. Specifically, the fact that Munson signed an agreement with the Ertls not to contest the underlying title dispute constitutes assent in and of itself. As noted above, the language of this agreement was quite broad. Indeed, Munson could not "in any way" become involved in the litigation or the patenting process. The clear import of this unambiguous language is that Munson agreed to let the title dispute between the United States and the Ertls run its course and to allow the Ertls complete discretion to negotiate for the issuance of the patents on whatever terms the Ertls saw fit, notwithstanding the impact on Munson's derivative interests. Also, Munson's own memos (Plaintiffs' Exhs. Q and R) verify that Munson

knew of the proposed settlement one year before the Ertls signed the settlement. Specifically, in stating that "I will need to prepare a division order based on full federal title and release the monies that I am now holding from suspense," Munson effectively conceded his liability. Similarly, after the settlement was signed but before the litigation was dismissed, Munson wrote letters to plaintiffs in which he stated that he would pay the royalties in suspense after the litigation "was settled finally once and for all without any appeals pending."

Second, as a lessee, Munson's rights are by definition derivative in nature. Thus, since the settlement agreements provide that the federal leases are valid, Munson's rights and corresponding responsibilities flow from them rather than from the claimants' parallel leases. Again, for reasons stated above, Munson cannot attack the legitimacy of the settlement agreements.

Third, clause 27 of Munson's and the plaintiffs' lease agreement provides that "[i]n the vent of a dispute as to title as to any royalty, working interest, or other interests subject thereto, payment or delivery on account thereof may be withheld without liability for interest until the dispute is finally settled." (Emphasis added). In allowing for Munson to withhold payment "until the dispute is finally settled," this provision of the parties' contract implicitly concedes that Munson will be bound by the outcome of the dispute. Of significance, the clause states that Munson can withhold payment "until the dispute is finally settled," not that he can withhold payment until the dispute is judicially resolved on the merits. That is, based on the express language of the contract, the underlying title dispute could have been resolved via a coin flip and Munson would be bound. Put another way, Munson's lease contract with the plaintiffs expressly ties his fate to a settlement agreement over which he admittedly had no control However, he contracted for his passive fate and his subsequent actions (i.e. signing agreement not to contest) are consistent with this. Accordingly, I find and hold that Munson, even though a third-party, is bound by the settlement agreements

based on the contract he signed with plaintiffs, the agreement not to contest he signed with the Ertls, and his subsequent actions and writings.

Finally, the Court rejects Munson's statute of limitations argument for the reasons stated by the Magistrate Judge. See Recommendation at 14-16. Furthermore, the Court rejects Munson's affirmative defenses of waiver and laches. A waiver is "the intentional relinquishment of a known right or privilege." Department of health v. Donohue, 690 P.2d 243, 247 (Colo. 1984). A waiver may be either express or implied. Id. In this case, since there was no express waiver, the Court need only address whether there was an implied waiver.

For an implied waiver to exist, the conduct in question must "be free from ambiguity and clearly manifest the intention not to assert the benefit." Id. Simply stated, no such conduct is evident here. For starters, no significance can be attached to plaintiffs lack of protest when Munson suspended his payments in 1980 since Munson was merely exercising this contract rights. Furthermore, once the settlement agreements were effectuated and the underlying cases dismissed, plaintiffs commenced efforts to collect the monies Munson had held in suspense. In short, at no time did plaintiffs manifest any intent to relinquish their right to be paid.

To support a laches defense, Munson must show inexcusable delay by plaintiffs in bringing suit and resulting prejudice to Munson from that delay. Brunswick Corp. v. Spring Reel Co., 832 F.2d 513, 523 (10th Cir. 1987). Generally, a suit filed within the applicable limitations cannot be barred by laches. See, e.g., Trustees of the Carpenters and Millwrights Health Benefit Trust Fund v. Lillard & Clark Const. Co.,780 F.Supp. 738, 742 (D. Colo. 1990); Beathune v. Cain, 494 P.2d 603, 605 (Colo. App. 1971), cert. Denied (1972) ("Mere delay short of the running of the applicable statute of limitations does not in and of itself constitute laches").

In this instance, since the plaintiffs filed their action within the applicable limitations period, the Court works from the presumption that laches cannot bar the case. Furthermore, there is no probative evidence that plaintiffs unreasonably delayed, exhibited bad faith, or engaged in culpable conduct. Also, Munson cannot point to prejudice sufficient to support a laches defense. See, e.g., Lin Ron, Inc. v. Mann's World of Arts and Crafts, inc., 624 P.2d 1343, 1345 (Colo. App. 1981). Therefore, Munson's affirmative defense of laches must fail.

Accordingly, for the reasons discussed above, the Magistrate Judge's Recommendation is ADOPTED in part and REJECTED in part. Specifically, insofar as the Magistrate Judge concludes that the settlement agreements entered into by the Ertls and marathon and the United States are valid, the Recommendation is ADOPTED. However, insofar as the Recommendation states that a material question of fact exists as to whether Munson is bound by the valid settlement agreements, it is REJECTED as being contrary to law since I conclude that there are no genuine issues of material which preclude summary judgment from entering. Therefore, it is

ORDERED that plaintiffs' Motion for Summary Judgment is GRANTED and defendant's Motion for Summary Judgment is DENIED. Accordingly, it is further

ORDERED that (1) Munson is required to pay plaintiffs overriding royalties for production proceeds attributable to Federal Oil and Gas Leases C-11448, C-11588, C-13792, and C-16755-A (i.e. the Ertl leases) from 1980 to the present and in the future since these leases are valid; (2) Munson is required to pay plaintiffs' overriding royalties for production proceeds attributable to Federal Oil and Gas Lease C-16754 (i.e. the marathon lease) from 1980 until June 28, 1994, the date which the United States and Marathon's agreement expired;[3] (3) pursuant to C.R.S. § 5-12-102(1)(B)(1991),

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[3] Though most of the discussion above concerned why Munson was bound by the settlement agreement between the Ertls and the federal government, which comprises approximately 95% of

plaintiffs are awarded prejudgment interest with the interest beginning to run on the dates that the title disputes were resolved – July 23, 1987 for the federal leases (or portions thereof) covered by the Ertl claims, and June 28, 1991 for the portion of Lease C-16754 covered by the Marathon claims.

DATED at Denver, Colorado this 18th day of January, 1996.

BY THE COURT:

s/_____
WILEY Y. DANIEL
United States District Court Judge

(cont'd.)..
the money in dispute, the analysis is equally applicable to the Marathon lease. However, unlike with the Ertl leases, the Marathon lease was issued as a result of adjudication on the merits and thus the general laws of mining apply. Thus, as of June 28, 1994, when Marathon's and the government's agreement expired, Marathon had an ordinary patent which did not preserve the federal oil and gas leases prospectively.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92-Z-1817

JAMES BARLOW FAMILY LIMITED PARTNERSHIP, et al.,

Plaintiff(s),

vs.

DAVID M. MUNSON, INC.,

Defendant(s).

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE BRUCE D. PRINGLE

This matter comes before the court on Plaintiffs' Motion for Summary Judgment and Defendant's Motion for Summary Judgment, both of which were filed on March 15, 1993. On May 17, 1995, an Order of Reference was issued, referring the cross-motions for summary judgment to a magistrate judge for recommendations regarding their appropriate disposition. The motions have been fully briefed, and oral argument was presented on July 6, 1995. For the reasons discussed below, it is recommended that both motions for summary judgment be denied.

I. Statement of Facts

A. Introduction

Plaintiffs hold overriding royalty interests and portions of the working interests in five federal oil and gas leases. They claim that defendant, David M. Munson, Inc. (Defendant or Munson), the owner of all or a portion of the working interests

in these leases, owes approximately $240,000 in overriding royalties. The primary issues in this litigation are (a) whether the United States had title to the oil and gas at the time the federal leases were issued, and (b) whether plaintiffs' rights vis-a-vis Munson under these federal leases were impacted by settlement agreements between the United States and certain oil shale mining claimants or by patents issued to the mining claimants by the United States.

B. The oil shale litigation

The backdrop for the instant case is the infamous "oil shale litigation," a series of lawsuits and administrative proceedings between the United States and numerous parties claiming the right to patents for oil shale placer mining claims in Colorado, which spanned a period of some 30 years. All of the claims were located prior to the enactment of the Mineral Leasing Act of February 25, 1920. At the time of their location, the federal mining laws provided that upon a discovery of valuable mineral deposits on the public domain, a locator obtained exclusive possession of the claim for mining purposes. Unpatented mining claims were recognized as a unique estate in land. This estate could be enlarged to a fee simple interest through the issuance of a patent by the United States.

In 1920, Congress passed the Mineral leasing Act, which substantially changed federal mining policy by withdrawing certain mineral lands, including oil shale lands, from location. Under the leasing system, private persons cannot acquire ownership of mineral lands, but may lease property from the United States in order to extract minerals. The federal mineral leases require the lessee to pay royalties to the government. The Mineral Leasing Act contained a Savings Clause which preserved previously located mining claims, so long as they were maintained in accordance with the prior law.

After the enactment of the Mineral Leasing Act, the United States declared shale locations invalid on the ground that the claimants had failed to perform annual assessment

work and, thus, had not maintained the claims within the meaning of Act's Savings Clause. The matter came to a head when the United States Supreme Court held that the United States could not invalidate oil shale claims for nonperformance of assessment work, since the failure to do such work was a matter which could only be raised by rival locators. *Ickes v. Virginia-Colorado Dev. Corp.*, 295 U.S. 639 (1935).

Following the decision in *Virginia-Colorado*, the government overruled, vacated, and reversed its prior administrative decisions that were in conflict with the Supreme Court's reasoning. *See The Shale Oil Company*, 55 I.D. 287 (1935). Until the early 1960's, patents were regularly and consistently issued on oil shale claims.

In 1964, the government reversed field and again began to contest the validity of unpatented oil shale claims. This prompted a new round of litigation that ultimately reached the United States Supreme Court in 1970. The Supreme Court clarified the decision in *Virginia-Colorado*, holding that the government could indeed refuse to issue patents and void shale claims if the assessment work performed on them did not amount to "substantial compliance." *Hickel v. Oil Shale Corp.*, 400 U.S. 48, 57 (1970). The supreme Court's decision in *Hickel* prompted 20 years of further litigation regarding the question of substantial compliance, as well as other issues. Finally, in May of 1985, Chief Judge Sherman G. Finesilver ruled in favor of the oil shale claimants on all remaining issues (*TOSCO Corp. v. Hodel*, 611 F. Supp. 1130 (D. Colo. 1985)), and directed the parties to engage in one last effort to settle their disputes.

Settlement discussions began and continued even after the United States appealed Chief Judge Finesilver's decision to the United States Court of Appeals for the Tenth Circuit. Commencing in 1986, settlements were reached. In September and October of 1986, various parties attempted to intervene in the Tenth Circuit to challenge the settlement agreement. In addition, the state of Colorado filed a separate lawsuit seeking

to upset the settlement agreement in the United States District Court for the District of Columbia. The Tenth Circuit concluded that the settlement agreement was final and deprived it of jurisdiction to consider the motions for intervention. *TOSCO Corp. v. Hodel*, 804 F.2d 590, 592 (10th Cir. 1986). The District of Columbia suit was transferred to the United States District Court for the District of Colorado and was ultimately dismissed.

B. The Ertl and Marathon oil shale claims

The specific oil shale claims involved in this case are referred to as the Ertl claims and the Marathon claims. Although they posed many of the same issues as those involved in *TOSCO Corp. v. Hodel*, the Ertls' patent applications were still pending in the Department of Interior in 1985 and, thus, were not the subject of Chief Judge Finesilver's May 1985 *TOSCO* decision. However, in April 1986, the Department of the Interior agreed to expedite agency review of the Ertls' patent applications. The Department rejected the applications, and the Ertls appealed to the United States District Court for the District of Colorado. The Ertls participated in the settlement negotiations which followed Chief Judge Finesilver's May 1985 Order in *TOSCO*, and the August 4, 1986 settlement agreement between the *TOSCO* claimants and the United States included the Ertl claims as well.

The Marathon shale claims were not involved in either the *TOSCO* or *Ertl* cases. In 1989, Marathon brought suit in the United States District Court for the District of Colorado, seeking to compel the government to issue a patent. In 1990, Chief Judge Finesilver issued an Order in *Marathon Oil Co. v. Lujan*, 751 F. Supp. 1454 (D. Colo. 1990) directing the Department of Interior to complete administrative processing of the Marathon patent application and to issue a patent within 30 days. On appeal, the United States Court of Appeals for the Tenth Circuit reversed the order requiring Interior to issue the patent, but affirmed that portion of the lower Court's Order mandating a speedy completion of the administrative process.

Marathon Oil Co. v. Lujan, 937 F.2d 498 (10th Cir. 1991). Thereafter, on June 28, 1991, Marathon and the United States entered into a settlement agreement resolving the litigation between them.

C. The oil and gas leases

Shortly after the United States Supreme Court decision in *Hickel*, the Department of Interior began to issue federal leases on shale lands pursuant to the Mineral Leasing Act. The fact that litigation continued regarding the validity and patentability of mineral claims located under the pre-1920 laws and involving these same lands did not deter the government in this endeavor. In 1970, plaintiffs or their predecessors in interest obtained the five federal oil and gas leases at issue here. The leases then were committed to the Sagebrush Hills II Unit in 1978. Under the terms of the leases, royalties on production were payable to the United States.

Plaintiffs or their predecessors in interest assigned the federal leases or the working interests therein to Munson. The assignments reserved to plaintiffs overriding royalty interests in four of the leases and a portion of the working interest in the fifth.

Munson was aware of the pending litigation between the United States and the oil shale claimants, and knew that the interests which it acquired under the assignments of the federal oil and gas leases would be defeated if the oil shale claimants succeeded in obtaining patents from the government. Consequently, in 1977 and 1980, Munson also obtained private oil and gas leases from the Ertls and Marathon, thereby protecting its oil and gas leasehold estate regardless of the outcome of the oil shale litigation. Munson obtained further protection against the potential of multiple royalty claims by negotiating an agreement with the Ertls whereby it would pay the Ertls' royalties in the first year of the leases, but would have no further obligation to pay royalties unless the litigation between the Ertls and the United States was resolved in the former's favor.

Munson began selling oil and/or gas production from the Sagebrush Hills II Unit in August of 1980. The Unit Agreement provided that the operator could withhold payments if there was a title dispute until such time as the title dispute was resolved. Munson invoked this provision prior to selling any production from the Unit, and, thus all amounts allegedly due plaintiffs as overriding royalties were placed in suspense. Munson did pay the royalties to the United States, as called for under the federal leases.

D. The oil shale litigation settlements

As indicated in Section I(A) above, settlements ultimately were reached between the oil shale claimants and the United States. On August 4, 1986, the *TOSCO* claimants and the Ertls entered into a settlement with the United States, pursuant to which the government agreed to issue patents to the claimants, and the claimants agreed to convey simultaneously to the government the ownership of all oil, gas, and coal. The agreement also stated that upon issuance of the patents and the reconveyance of the oil, gas, and coal interests, the judgments entered in the United States District Court for the District of Colorado should be vacated and the *TOSCO* and *Ertl* cases should be dismissed. On November 7, 1986, patents were issued to the claimants and, in turn, the claimants delivered special warranty deed to the United States for oil, gas and coal. The *Ertl* case was dismissed on July 23, 1987. On August 12, 1987, the United States Court of Appeals for the Tenth Circuit vacated all district court judgments in *TOSCO*, as well as all findings of fact and conclusions of law embodied in Chief Judge Finesilver's May 1985 decision, and dismissed the appeal.

On June 28, 1991, Marathon and the United States settled the dispute between them by executing an "Agreement Relating to Lands in Rio Blanco County, Colorado." On the same day, and pursuant to the settlement, the United States issued a patent covering Marathon's claims. The patent was delivered to an agent, who was to retain the patent pending negotiations

between Marathon and the Department of Interior for a land exchange. The settlement agreement provided that the federal oil and gas leases on the Marathon claims would remain in effect while the patent was held by the agent.

II. Legal Standards applicable to Motions for Summary Judgment

A motion for summary judgment may be granted only where there are no material issues of fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The test for determining the presence or absence of a material issue of the fact is the same as the test for a directed verdict; namely, whether the evidence is sufficient to sustain a verdict for the non-moving party. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 246 (1986); *Merrick v. Northern Natural Gas Co.*, 911 F.2d 426, 429 (10th Cir. 1990). In applying this standard, the Court must view the evidence in the light most favorable to the non-moving party, and assess its sufficiency consistent with the evidentiary burden imposed by the controlling substantive law. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 246 (1986); *Exnicious v. United States*, 563 F.2d 418, 423 (10th Cir. 1977). Doubts should be resolved in favor of the presence of triable fact issues. *Boren v. Southwestern Bell Tel. Co.*, 933 F.2d 891, 892 (10th Cir. 1991).

If the moving party will not bear the burden of proof at trial, that party's motion for summary judgment need only demonstrate the absence of an essential element of the opponent's case. Thereafter, the non-moving party must come forward with evidence in the form of affidavits, depositions, answers to interrogatories, and admissions to establish that a genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If, on the other hand, the crucial issue is one on which the movant will bear the ultimate burden of proof at trial, summary judgment can be entered only if the movant submits evidentiary materials to establish all of the elements of the claim or defense. *Resolution Trust Corp. v.*

Northpark Joint Venture, 958 F.2d 1313, 1322 (5th Cir. 1992), *cert. denied, Dannis v. Resolution Trust Corp.*, 113 S.Ct. 963 (1993); *Resolution Trust Corp. v. Gill*, 960 F.2d 336, 340 (3d Cir. 1992).

III. Analysis

A. Are there issues of fact in dispute

Plaintiffs have moved for summary judgment, contending that the undisputed facts establish, as a matter of law, that they are entitled to receive all accrued overriding royalties for production proceeds attributable to the federal oil and gas leases, as well as a declaratory judgment that the federal leases are valid and enforceable. Their position in this regard is premised on the Ertl and Marathon settlement agreements. Specifically, plaintiffs argue that (a) the settlement agreements manifest an intent to validate the federal oil and gas leases and to recognize these leases as the operable conveyances of oil and gas exploration rights on the subject properties; and (b) although Munson is not a signatory to the settlement agreements, he has either agreed to accept their terms and conditions or, through his conduct, is estopped from denying that he is bound by them. Munson has also moved for summary judgment. Munson asserts that (a) he is not bound either contractually or through principles of estoppel by the provisions of the settlement agreements, and (b) as a matter of law, the government's issuance of patents validates the shale claimant's property rights as of the date of the location of the claims and, thus, validates the private oil and gas leases issued to Munson by the claimants.

The threshold matter which must be addressed in order to resolve the pending motions for summary judgment is the effect of the Ertl and Marathon settlement agreements with the government on the instant litigation. The settlement agreements are contracts, and generally contracts only impact those who have manifested an assent to be bound. *Restatement (Second) Contracts § 18*. Manifestation of assent may be in writing, oral, or by conduct. *Restatement (Second) Contracts*

§ 19. An exception to this general rule exists where one's conduct indicates an intent to be bound, and reasonably causes another to act to his detriment in reliance thereon. *Restatement (Second) Contracts § 90(1)*. *See also Hansen v. GAB Business Servs.*, 876 P.2d 112, 114 (Colo. Ct. App. 1994); *Galie v. RAM Assocs. Management Servs.*, 757 P.2d 176, 178 (Colo. Ct. App. 1988).

Plaintiffs acknowledge that Munson is not a signatory to either the Ertl or Marathon settlement agreements. Nevertheless they point to Munson's conduct as manifesting an intent to be bound by the settlements. Particularly, they note that (a) Munson made a conscious decision not to intervene in the oil shale litigation and, in fact, signed an "Agreement Not to Contest," which provided that he would not "initiate, join in, support, defend or in any way become involved in a contest of the [oil shale] claims; (b) Munson indicated that he would disburse the suspended funds in accordance with the outcome of the oil shale litigation; and (c) Munson stated that he would release the suspended funds once the settlement was approved. Plaintiffs also point to the fact that Munson knew of the settlement negotiations and was aware of the terms of the settlements before they were finalized, but never voiced objection or disagreement with any of the terms or provisions.

On the other hand, Munson vehemently denies that he manifested any assent to be bound by the Ertl or Marathon settlement agreements, or that his conduct could have reasonably led the parties to these settlement agreements to assume that it would be bound by the terms and conditions thereof. In support of his position, Munson observes that he did not sign the settlement agreements, and was not requested to sign them. He takes issue with the proposition that his agreement not to become involved in the oil shale litigation represents a consent to be bound by settlements negotiated between the claimants and the government.

Although the interpretation of a written contract is generally a question of law, the question of whether parties

have entered into a contract or agreed to be bound by its terms is an issue of fact. *American Private Line Services, Inc. v. Eastern Microwave, Inc.*, 980 F.2d 33, 35 (1st Cir. 1992) ("The existence of a contract ordinarily is a question of fact . . . ."); *Stahl v. Sun Microsystems, Inc.*, 775 F. Supp. 1394, 1397 (D. Colo. 1991), *aff'd*, 19 F.3d 533 (10th Cir. 1994) (same); *Luna v. Denver*, 718 F. Supp. 854, 857 (D. Colo. 1989), *aff'd*, 948 F.2d 1144 (10th Cir. 1991 (same). Likewise, the key inquiry under the promissory estoppel doctrine—whether one's conduct reasonably induced action or forbearance of a definite and substantial character—is factual in nature and is ordinarily submitted to the fact finder for resolution. *R.S. Bennett & Co., Inc. v. Economy Mechanical Indus.*, 606 F.2d 182, 186 (7th Cir. 1979) ("Although the matter of avoidance of injustice might seem to be a question of law . . . the satisfaction of other elements [of the promissory estoppel doctrine] is a question of fact."); *Gill v. United States Rubber Co.*, 195 F. Supp. 837, 839 (N.D. Ind. 1961). Although many of the facts regarding the nature of Munson's conduct may be undisputed, reasonable people could draw different inferences as to whether Munson agreed to be bound by the settlement agreements and/or whether his conduct induced reliance or forbearance of a substantial nature. *See Luna v. Denver*, 718 F. Supp. at 857 ("where . . . the existence of a contract is at issue, and the evidence is conflicting *or admits of more than one inference*, it is for the jury to decide whether the parties have entered into a contract and whether a contract in fact exists.) (emphasis added).

B. Are the fact issues "material"

The existence of a factual dispute precludes granting summary judgment only if the facts in dispute are "material." In the context of Fed. R. Civ. P. 56, a fact is "material" if it has the potential to affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Vasapolli v. Rostoff*, 39 F.3d 27, 31 (1st Cir. 1994). Having determined that a factual dispute exists as to whether Munson is bound by the terms of the Ertl and

Marathon settlement agreements, the Court now turns to the question of whether this dispute has the potential to affect the outcome of the case.

After reviewing the written Ertl and Marathon settlements, the Court concludes that the parties clearly and unambiguously agreed to recognize the validity of the federal oil and gas leases, and to treat them as the operative conveyances of the oil and gas mineral leasehold estates. This intent is evident from the language in Section 3 of the Ertl settlement, which states:

> The Department of the Interior has issued certain presently outstanding oil and gas leases involving lands within certain of the Subject Claims . . . . The patents issued and conveyance made pursuant to paragraph 2 of this Agreement shall not affect the validity or duration of such existing oil and gas leases . . . . The duration of such leases shall continue to be determined by the terms of the lease and by applicable statutes, including the Mineral Leasing Act of 1920, and their implementing regulations.

The parties intent to validate the federal leases is further evidenced by Paragraph 3.3, which discusses the obligation of the government to use its best efforts to administer the federal leases in a manner protective of the claimants' dominant estate. Finally, the claimants' agreement to convey the mineral estate in oil, gas, and coal to the government simultaneously with the issuance of the patents so that there would be "no temporal gap whatsoever in ownership by the United States of the interests it retains" again reflects a clear intent to preserve the federal leases. *See Ertl Settlement Agreement (Exhibit F to Plaintiffs' Motion for Summary Judgment), para. 2.5.*

The Marathon settlement agreement, likewise, reflects the parties' intent to recognize the validity and enforceability of the federal oil and gas leases. In essence, the agreement calls for the government to issue a patent conveying legal title to the

Portland Claims 1-6 to Marathon. The agreement further provides that the patent be delivered to an agent who would hold it pending negotiations between Marathon and the United States for a land exchange. Paragraph 8 of the agreement expressly states that "[f]ederal oil and gas leases covering lands in Portland Claims Nos. 1 through 6 included in the patent shall remain in effect during the period the patent is held by the agent . . . ." *See Marathon Settlement Agreement (Exhibit L to Plaintiff's Motion for Summary Judgment) para. 8.*

Munson asserts that even if he is bound by the settlement agreements' validation of the federal leases, plaintiffs' rights thereunder have been extinguished by the statute of limitations. The Court disagrees. The instant suit is a contract action to recover a liquidated debt or an unliquidated, determinable amount of money due as overriding royalties. As such, it is governed by a six-year statute of limitations. COLO. REV. STAT. § 13-80-103.5. The claim accrued when the debt, obligation, money owed, or performance became due. COLO. REV. STAT. § 12-80-108. Although production under the federal leases commenced in 1980, the Unit Agreement, to which Munson was a party, specifically provided that

> In the event of a dispute as to title as to any royalty, working interest, or other interests subject thereto, payment or delivery on account thereof may be withheld without liability for interest until the dispute is finally settled . . . . *Unit Agreement (Exhibit A to Plaintiff's Motion for Summary Judgment) para. 27.*

Pursuant to Paragraph 27 of the Unit Agreement, Munson had a legal right to withhold payment of overriding royalties, and, consequently the obligation to pay overriding royalties did not accrue until the title dispute (i.e., the oil shale litigation) was resolved. The title dispute regarding the Ertl claims was not finally resolved until the settlement agreement was executed *and all attacks on the settlement agreement were rejected.* This did not occur until at least July 23, 1987, when

the *Ertl* case was dismissed, and arguably not until March 4, 1988, when the state of Colorado's case was dismissed. The title dispute concerning the Marathon claims was not concluded until 1991. Whether plaintiffs' right to receive payment of overriding royalties accrued in July of 1987, March of 1988, or 1991, the instant suit was commenced well before the six-year limitation period expired.

If Munson is not bound by the Ertl and Marathon settlements, then, as Munson correctly observes, neither the terms of the settlement agreements nor the intent of the parties thereto can be considered in deciding the instant controversy. Under such a scenario, the fact that the United States issued patents to the oil shale claimants, and the legal implications of these patents as derived from federal statutes, supply the governing criteria for resolving the validity of the conflicting leases.

Congress has identified the requirements which must be met before a mining claimant is entitled to a patent. If the requirements are met, the mining claimant has an absolute right to the patent and the United States has no right to withhold it. *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306, 318 (1930); *State of South Dakota v. Andrus*, 614 F.2d 1190, 1193 n.3 (8th Cir. 1980). Conversely, if the statutory criteria are not met, the United States has no authority to issue a patent. 2 *American Law of Mining* § 51.03. In short, the decision as to whether or not to issue a patent is nondiscretionary. Thus, the Department of Interior's function is simply to determine whether or not an applicant for a patent has complied with the statutory directives and criteria. The issuance or withholding of the patent flows solely, directly, and automatically from this determination. These legal principles provide the basis for the rule that the issuance of a mineral patent creates a conclusive presumption that the claimants or their predecessors in interest made valid locations and otherwise complied with all the

requirements of the law. 2 *American Law of Mining* § 54.05[2].[1]

The holder of a valid mining claim is vested with equitable and possessory title, transferrable by deed or devise, and otherwise possessing incidents of real property. *Wilbur v. United States ex rel. Krushnic*, 280 U.S. at 316-17. The claimant has the exclusive right of possession against every person and against the United States. *Reed v. Munn*, 148 F. 737, 757 (8th Cir. 1906). Furthermore, upon obtaining a patent, it relates back to the date of location. *Id.*

It is undisputed that the Ertls and Marathon received patents from the United States. As a matter of law, the patents carried with them a conclusive presumption that the mining claims were valid and that the claimants were in compliance with all of the statutory requirements. Furthermore, as a matter of law, the issuance of the patents validated the claimants' equitable and exclusive possessory title, including the exclusive right to lease the oil and gas mineral estate, from the date of location.

The foregoing analysis demonstrates that if the finder of fact determines that Munson is bound by the Ertl and Marathon settlement agreements, plaintiffs may well be entitled to judgment in their favor.[2] On the other hand, if the finder of fact concludes that Munson is not bound by the settlement agreements, then the legal implications flowing from the issuance of the patents are determinative and dictate that Munson is entitled to judgment as a matter of law.

---

[1] An exception to this rule exists when an action in equity is commenced by the United States to cancel or modify a patent.

[2] The Court cannot conclude that in such a situation, plaintiffs would be entitled to prevail as a matter of law, because there appear to be other affirmative defenses raised by Munson which have not been addressed in the motions for summary judgment.

Accordingly, the factual dispute as to whether Munson assented to the settlement agreements and/or whether it is bound by virtue of the promissory estoppel doctrine are "material," within the meaning of Rule 56, and both motions for summary judgment should be denied.[3]

Based on the foregoing, it is hereby RECOMMENDED that both Plaintiffs' Motion for Summary Judgment and Defendant's Motion for Summary Judgment be DENIED.

It is ORDERED that, pursuant to Fed.R.Civ.P. 72(b), any party objecting to the Recommendation in this matter shall, within ten days after service of this Recommendation, serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Any objections must specifically identify those findings and recommendations to which the objections are being made. Failure to file a timely written objection may bar the parties from a *de novo* determination or appeal of the findings and recommendations herein by the District Court Judge.

DATED THIS 17th DAY OF JULY, 1995.

BY THE COURT:
s/_____
United States Magistrate Judge

---

[3] The fact that the parties have filed cross-motions for summary judgment does not affect the applicable standard under Rule 56, and the Court may deny both motions if there is a genuine issue of material fact. *Heublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir. 1993).

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 96-1202

JAMES BARLOW FAMILY LIMITED PARTNERSHIP; JOHN AND LOIS HAUN FAMILY PARTNERSHIP; BARLOW & HAUN, INC.; L.A. MCPEEK AND COMPANY; BARBARA B. CREWS; B.J. BRADSHAW ESTATE, by First Interstate Bank of Utah, Trustee; ALPHA EXPLORATION, INC.; CHEVRON U.S.A., INC.,

Plaintiffs-Appellees,

vs.

DAVID M. MUNSON, INC.,

Defendant-Appellant

UNITED STATES OF AMERICA,
Amicus Curiae.

ORDER

Entered November 12, 1997

Before **SEYMOUR**, Chief Judge, and **HENRY** and **BRISCOE**, Circuit Judges.

Appellees' petition for rehearing is granted in part. We clarify the last sentence on page 11 of the opinion and remand for further proceedings to resolve outstanding issues if any remain. The revised opinion is attached. Rehearing is otherwise denied. Appellees' motion to file a reply to the response to the petition for rehearing is granted.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

By: s/_____
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 96-1202

JAMES BARLOW FAMILY LIMITED PARTNERSHIP; JOHN AND LOIS HAUN FAMILY PARTNERSHIP; BARLOW & HAUN, INC.; L.A. MCPEEK AND COMPANY; BARBARA B. CREWS; B.J. BRADSHAW ESTATE, by First Interstate Bank of Utah, Trustee; ALPHA EXPLORATION, INC.; CHEVRON U.S.A., INC.,

Plaintiffs-Appellees,

vs.

DAVID M. MUNSON, INC.,

Defendant-Appellant

UNITED STATES OF AMERICA,
Amicus Curiae.

ORDER

Entered December 15, 1997

Before **SEYMOUR,** Chief Judge, and **HENRY** and **BRISCOE,** Circuit Judges.

The Barlows have filed a motion to clarify our order and opinion on rehearing. Because our mandate isued on November 21, 1997, we treat the motion as one to recall the mandate. Under our inherent authority to recall the mandate for the purpose of clarifying an ambiguous prior order of the court, *see* Coleman v. Turpen, 827 F.2d 667, 67 (10th Cir. 1987); Dilley v. Alexander, 627 F.2d 407, 410-411 (D.C. Cir. 1980), we grant the motion and recall the mandate. We clarify the opinion by eliminating the phrase on page 3 stating that we grant summary judgment in favor of Munson and by stating instead that we remand the matter for further consideration. In addition, on the last page we eliminate the phrase "and Munson thus has a complete defense to the nonpayment of royalties to the Barlows." The revised opinion is attached.

Entered for the Court

s/_____
PATRICK FISHER, Clerk

(2)

Supreme Court, U.S.
FILED
FEB 27 1998
CLERK

No. 97-1328

In The

Supreme Court of the United States

October Term, 1997

JAMES BARLOW FAMILY LIMITED PARTNERSHIP, *et al.*,

Petitioners,

vs.

DAVID M. MUNSON, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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15 pp

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Petitioners' statement of the questions presented conveys the incorrect impression that the parties to this litigation were also parties to the settlement agreement referenced in petitioners' first question. Since neither the petitioners nor respondent was a party to the settlement agreement relied upon by petitioners, respondent believes that the issues presented are more properly stated as follows:

1. Was the Tenth Circuit Court of Appeals correct in ruling that settlement agreements entered into between the United States on the one hand, and certain mining claimants (the Ertls and Marathon) on the other, did not adversely affect the property rights of respondent, which was not a party to either agreement?

2. Was the Tenth Circuit Court of Appeals correct in following the precedent of this Court in *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 334-35 (1906), that "A patent from the United States operates to transfer the title, not merely from the date of the patent, but from the inception of the equitable right upon which it is based?"

STATEMENT PURSUANT TO RULE 29.6

Respondent has no parent company and no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

Petitioners brought this action to obtain payments of amounts (approximately $470,000) they assert are due from respondent Munson as overriding royalty interest payments under certain federal oil and gas leases. Munson responded by asserting that the federal oil and gas leases from which petitioners' claims derive are invalid. Munson asserted instead that private leases issued by certain oil shale mining claimants (the Ertls and Marathon Oil Company) to Munson are the valid, operative instruments under which royalties are payable. Petitioners own no interests in those private leases. Munson's position was based upon the fact that the Secretary of the Interior issued valid mining patents to the Ertls and Marathon covering the lands included in the federal leases relied upon by petitioners.

The Tenth Circuit ruled that issuance of the patents established conclusively as a matter of law that the federal oil and gas leases upon which petitioners rely were void *ab initio*, and that the Marathon and Ertl leases, upon which Munson relies, were valid. The Tenth Circuit also rejected petitioners' assertions that the terms of a settlement agreement reached between the Ertls and the United States somehow preserved petitioners' overriding royalty interests.

In the proceedings below the petitioners asserted that the terms of a separate settlement agreement reached between Marathon Oil Company and the United States also preserved their overriding royalty interests. The Tenth Circuit rejected this contention as well, treating both the Ertl and Marathon agreements in the same fashion. Before this Court petitioners have abandoned the Marathon portion of their appeal without explaining why the Ertl settlement agreement serves to preserve their claims, while the Marathon agreement does not.

Petitioners assert (at p. 2) that the Tenth Circuit's decision "raises critical questions about the validity and enforceability of the settlement" of various oil shale cases, and that it "is a radical departure from the law of other Circuits." Neither assertion is correct. In truth, the only effect of the decision is to confirm the rather ordinary proposition that royalty payments are not owed under invalid oil and gas leases. None of the parties to the settlement agreements relied upon by petitioners are before this Court complaining about the outcome or rationale of the Tenth Circuit's decision. No portion of the decision departs from the law of the Tenth Circuit, this Court, or any other circuit court of appeals.

FACTUAL AND LEGAL BACKGROUND

The Tenth Circuit's decision in this case rests upon the simple fact that Munson obtained oil and gas leases from the Ertls and Marathon at a time when those two private parties owned the oil and gas estate to the lands at issue. In the time period in which Munson obtained these leases (1977-1980), Munson could not be certain that the Ertls and Marathon owned the oil and gas estate, because their mining claims to these lands were being contested. However, by 1992, when petitioners filed this lawsuit, those contests had been fully and finally adjudicated.

The outcome of those adjudications was that the Secretary of the Interior issued mining patents under the Mining Resources Act of May 10, 1872, ch. 152, 17 Stat. 92 (codified as amended at 30 U.S.C. § 22-24, 26-30, 33, 34, 37, 39-42 (1982)) to the Ertls and Marathon. The legal consequences which flow from issuance of a mining patent under the 1872 Act are fixed, and easily ascertainable by reference to any standard mining law treatise.

Patents issued under the 1872 Act reserve no minerals. 30 U.S.C. § 22, *et seq.* The patent may convey no conditions not authorized by law. *Deffeback v. Hawke*, 115 U.S. 392, 405-6 (1885); *South Dakota v. Andrus*, 614 F.2d at 1193 n.3, *cert. denied*, 449 U.S. 822 (1980) (quoting *United States v. Kosanke Sand Corp.*, 12 IBLA 282, 290-1 (1973)). The patent may convey no more and no less than Congress authorizes in the mining statutes, regardless of the language of the patent. *2 Amer. L. Min.*, § 30.06[5]. A reservation in the patent that is not authorized is inoperative. *2 Amer. L. Min.*, § 9.02.

The Secretary is not authorized to issue a patent until satisfied that the applicant meets all criteria. *2 Amer. L. Min.*, § 51.03. The issuance of the patent adjudicates the validity of the claim. *2 Amer. L. Min.*, § 54.05.

The issuance of the patent divests the United States of the legal title and merges the legal title with the equitable title already held by the patentee. *Marathon Oil Co. v. Lujan*, 751 F. Supp. 1454, 1468 (D. Colo. 1991), *aff'd in part, rev'd in part*, 937 F.2d 498 (10th Cir. 1991). The patentee's title relates back in time to the date of the original location and terminates the rights of subsequent claimants to the lands. *Deffeback*, 115 U.S. 392, 405-6 (1885); *Reed v. Munn*, 148 F. 737, 757 (8th Cir. 1906), *cert. denied*, 207 U.S. 588 (1907); *2 Amer. L. Min.*, §§ 30.06[5], 54.01[2].

Here the "subsequent claimants to the lands" at issue consist of the United States (which issued federal oil and gas leases to the lands in 1970, some fifty years after the mining claimants had acquired equitable title to the oil and gas estate) and the petitioners (who acquired those federal leases, then assigned them, reserving the overriding royalty interests which form the basis for their claims in this litigation).

In the 1977-80 time period, following normal practices recommended by title lawyers when an operator desires to lease lands that are subject to unpatented mining claims, Munson obtained separate oil and gas leases, one set issued by the federal government, the other by the mining claimants. At the time it did so, it knew that one of the two chains of title was valid, the other was not. If patents issued, that would — under the legal principles cited above — conclusively confirm that at the time of leasing (*i.e.* 1977-1980) the mining claimants owned valid title to the interests they leased. Thus, issuance of the patents would serve to confirm the validity of Munson's "private" leases.

In this sense, issuance of a patent is analogous to issuance of a judicial decree of quiet title, not to execution and delivery of a deed of assignment. Just as a judicial decree doesn't *create* rights, but instead serves to *confirm* and document in a binding fashion the nature of rights that previously existed, so too does the issuance of a patent serve the same function.

Patents did issue. That fact served to confirm — finally and conclusively — the pre-existing fact that neither the federal government nor the petitioners owned any rights in the oil and gas estate at the time when the federal leases were issued. As a consequence, Munson declined to honor claims for payment that derived from this invalid chain of title.

THE TENTH CIRCUIT CORRECTLY RULED THAT TWO SETTLEMENT AGREEMENTS DID NOT ADVERSELY AFFECT MUNSON'S PROPERTY RIGHTS

Petitioners fundamentally misconstrue the Tenth Circuit's decision in this case as an attack upon, and a failure to enforce, the Ertl/United States settlement agreement. In truth, the Tenth Circuit decision recognized the settlement agreement for what

it is: a two party contract, binding on the parties who executed it. Where the Tenth Circuit parts company with the petitioners is where the petitioners insist that this two-party contract serves to take away property rights not owned by either of the contracting entities.

Accordingly, when the Secretary of Interior agreed to issue patents to the claimants, the Tenth Circuit decision recognizes the binding nature of this promise. Where the settlement agreement specifies that "the form of the patents to be issued . . . shall be that of a standard mining claim patent granting the Claim owners fee ownership of the entire claim," then the Tenth Circuit recognizes that too as a binding obligation of the Secretary. Where the agreement obligates the Claimowners "by special warranty deed [to] convey to the United States all interest in the oil, gas and coal present within such claim," then the Tenth Circuit acknowledges that this was a binding obligation of the Ertls. So too, when the Ertls "waive any right to recover rents or royalties paid to the United States prior to the date of execution of this Agreement, or accruing to the United States thereafter," the Tenth Circuit acknowledged that this provision had the binding effect of preserving intact the United States' rights to royalty payments, past, present and future.

However, where this two-party contract sought to appropriate property rights to the United States which were not owned by either the Ertls or the United States, the Tenth Circuit ruled that such efforts have no legally binding effect. Thus, the Tenth Circuit recognized that § 1.2 of the settlement agreement, which states "[t]he United States shall have and retain full title to (fee ownership of) the oil, gas and coal present within each of the Subject Claims," cannot have the effect of authorizing the United States to "have and retain full title to" property already owned by Munson.

This two-party settlement contract can no more treat Munson's leasehold right in this fashion than it can "agree" to allow the United States to "have and retain full title to" Munson's office furniture or bank accounts. Accordingly, when the Tenth Circuit refused to rule that Munson's property rights were negated by these provisions, it was not undermining "the finality and enforceability of settlement agreements generally." Petition at 7. All the court was doing was recognizing the proper legal consequences that flow from the agreement, while disregarding any illegal consequences intended by the parties.

THE TENTH CIRCUIT DECISION PROPERLY APPLIED THIS COURT'S "RELATION BACK" DOCTRINE.

Petitioners argue that property rights granted under patents issued by the United States should vary, dependent upon the "equities and circumstances involved." Petition, p. 10. The Tenth Circuit properly rejected this novel contention, adhering instead to the precedent of this Court by ruling that "the rights accorded holders of such unreserved patents are clear." P. App. at 7a.

Under petitioners' view of property law, a title examiner who reviews an abstract containing a mining patent issued under the 1872 Act would not be able to ascertain from the public record what property rights are owned by the patentee and its successors in interest. Instead, to glean what these rights are the examiner would be required to know all of the "equities and circumstances involved" in the underlying claim, and to guess how a court might ultimately view these "equities."

Under the Tenth Circuit's view of property law,

> when a mining claim has been perfected under the law, it is in effect a grant from the United States of

> the exclusive right of possession to the same. It constitutes property to its fullest extent, and is real property subject to be sold, transferred, mortgaged, taxed and inherited without infringing any right or title of the United States.

P. App. at 8a (citing *United States v. Etcheverry*, 230 F.2d 193, 195 (10th Cir. 1956)).

The mining claims involved in this case were perfected prior to 1920. The Tenth Circuit followed the holding of this Court in *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 334-35 (1906), in ruling that "a patent from the United States operates to transfer title, not merely from the date of the patent, but from the inception of the equitable right upon which it is based." P. App. at 8a. The Tenth Circuit decision pointed out that under its (and this Court's) precedents, the effect of this rule of property law is that "upon issuance of a patent, title *relates back* to the date of original entry," and "the consequence of relation back is that the claimant's rights and those of the claimant's assignee date from the time the claim was made, not from the time the patent was issued." *Id.*

Thus, the Tenth Circuit's decision makes it apparent that the "relation back" doctrine is not some kind of judge-made law, to be applied or not as a judge sees fit. It is instead a way that courts have explained the rights of a patentee whose title emanates from the 1872 Act. The rights that are explained by the "relation back doctrine" stem from Congress, not from the judiciary. Throughout the entire history of the 1872 Act (one that now spans well over half of the history of this country) not a single court that has ever considered the question has entered a final judgment that fails to apply the principle underlying the "relation back doctrine."

The difficulties that would ensue if this Court were to accept the invitation of petitioners to overturn this 136-year string of unbroken precedent are well illustrated by the facts of this case. Petitioners insist that "equities" and "circumstances" entitle them to escape the results of "mechanically" applying the relation back doctrine. The nature of petitioners' "equities" does not appear in the petition, and escaped the notice of the Tenth Circuit when it considered this case.

Petitioners consist of various entities that are successors-in-interest to professional oil and gas lease brokers, or are themselves professional oil and gas exploration and production companies. In 1970-71 petitioners acquired their interests in federal oil and gas leases for a nominal filing fee and $1/acre rental payment under a "simultanous filing program" that was legislated out of existence in 1987. *See Law of Federal Oil and Gas Leases*, ch. 6, Rocky Mtn. Min. L. Found. (Linnea M. Simons & Karen K. Kaiser eds., Sept. 1995) for a description of how this lease application system operated.

The United States does not warrant title to its oil and gas leases because it recognizes that the prior location and maintenance of a valid mining claim divests the United States and its lessees of the right to develop the oil and gas. *See Law of Federal Oil and Gas Leases* § 3.10 and § 21.08[3]. Consequently, a federal lessee assumes the responsibility for verifying title to federal oil and gas leases, and protecting its leasehold interest against any clouds on title. John E. Holtzinger and Arvin M. Kramish, Note, *Multiple Mineral Development of Public Lands*, 24 Geo. Wash. L. Rev. 319, 329 (1956).

The problems posed by unpatented mining claims are well known in the oil and gas industry, and common methods of dealing with these problems have evolved. The most common solution is to obtain protective leases from the mining claimants.

George J. Morgenthaler, *Oil and Gas Title Examination*, at 123-24 (1982). In this case, although the petitioners were all experienced brokers in federal oil and gas leases, they did not undertake any protective measures. Several years later, when Munson acquired interests in the area, it was not so haphazard in its approach. As the Tenth Circuit decision notes, "faced with this uncertainty of title, Munson prudently acquired both private and federal oil and gas leases." P. App. at 3a.

It was because petitioners neglected to obtain protective leases that ownership of two competing chains of title diverged, and thereby gave rise to this litigation. When they first acquired their federal oil and gas leases the petitioners possessed the full power and ability to protect their royalty claims by following prudent oil-field practices. Having failed to do so, the petitioners possess no "equities" whatsoever. Certainly their claims do not warrant grant of the extraordinary remedy they are now seeking — the reversal of long-settled property law principles to bail them out of the consequences of their own failure to act.

CONCLUSION

The decision of the Tenth Circuit properly applies the 1872 Act, the precedents of this Court, and the precedents of all circuit courts of appeal that have dealt with mining law issues. There is no basis for reversing that decision, thus the petition for writ of certiorari should be denied.

Respectfully submitted,

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February 27, 1998

(3)

Supreme Court, U.S.
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No. 97-1328

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JAMES BARLOW FAMILY LIMITED PARTNERSHIP, ET AL.,

Petitioners,

v.

DAVID M. MUNSON, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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I. Respondent Mischaracterizes the Tenth Circuit's Decision.

In an effort to diminish the significance of the Tenth Circuit's decision, respondent claims that the Court of Appeals merely declined to permit a settlement agreement between two parties to adversely affect the property rights of a third party. Brief in Opposition at 2. Respondent mischaracterizes the Tenth Circuit's decision.

First, the Tenth Circuit began its analysis "by reviewing and analyzing the settlement agreements to which Munson is alleged to be bound." Petition for Certiorari at 5a. After reciting the provisions of the agreements designed to preserve the federal leases, the Tenth Circuit called those provisions a "fiction" and said they were "simply not legally effective." Id. at 9a. The court reached this conclusion based on its interpretation of the "relation back doctrine"; it did not even mention the fact that Munson did not personally sign the agreements. Id. at 5a-9a.

Second, later in its opinion the Tenth Circuit acknowledged that "Munson might have been bound [by the Ertl settlement agreement] had Ertl acquired title to the oil and gas *which did not relate back* to the establishment of its mining claim . . . ." Id. at 14a (emphasis added). Thus, the Tenth Circuit's holding that Munson is not bound by the settling parties' efforts to preserve the federal leases is expressly tied to the court's earlier holding that the relation back doctrine invalidates the settlement. It is not based on Munson's purported status as a "third party."

Third, that Munson did not sign the settlement is irrelevant. Munson acquired his oil and gas lease from the Ertls with full knowledge of the pending oil shale litigation. Appellate App. I at 254. Accordingly, Munson

claims under the same title as the Ertls, stands in "privity" with them, and is bound by the outcome of the litigation St. Louis Baptist Temple v. F.D.I.C., 605 F.2d 1169, 1175 (10th Cir. 1979), see also Restatement (Second) of Judgments § 44. That outcome was the settlement signed by the Ertls.

Fourth, the settlement did not adversely affect Munson's "property" rights. Munson's property rights were as lessee of the oil and gas. He was a lessee before the settlement; he was a lessee after the settlement. All the settlement did was determine which set of leases – the private or the federal leases – was the valid set. Indeed, Munson acquired the two sets of leases to ensure that the outcome of the litigation would not adversely affect his status as lessee. Stipulated Facts, Appellate App. II at 380.

II. Respondent Misconstrues The "Relation Back" Doctrine And Its Application In This Case.

The Tenth Circuit's decision in this case is premised on its automatic application of the "relation back" doctrine, despite the express terms of the settlement agreement and the contrary intent of the settling parties. Respondent attempts to support this holding by asserting that the "mining claims involved in this case were perfected prior to 1920." Brief in Opposition at 7. Whether those claims were in fact perfected prior to 1920 (and properly maintained thereafter), however, was the very issue litigated for more than 20 years in the oil shale litigation. And it was the issue settled by the parties in the settlement agreement.

The settlement agreement resolved this issue by having the United States issue mineral patents to the oil shale claimants and having the oil shale claimants simultaneously reconvey the oil, gas, and coal to the

United States. See Settlement Agreement Clause 2.5, *reprinted in* District Court Order at 19a-20a n.2. As pointed out by the district court, the settlement agreement represented a compromise of the parties' positions. District Court Order at 20a. The issuance of the patents was made possible only by other provisions of the settlement agreement.

Respondent claims that issuance of the patents "served to confirm" the validity of the mining claims and the invalidity of the federal leases. Brief in Opposition at 4. Respondent thus wants to selectively rely on one component of this settlement while ignoring the other component. However, as the district court stated: "Munson cannot latch onto one part of the settlement – the issuance of patents – to deny the other part – the preservation of federal leases." Id at 23a. Because the validity of the oil shale mining claims was settled, and because that settlement is binding on Munson as a party in privity, the Tenth Circuit should not have applied the "relation back" doctrine in a manner that contravenes the compromise the parties struck.

Respondent also incorrectly describes the "relation back" doctrine as a legal doctrine embedded in the 1872 General Mining Law, as opposed to an equitable doctrine applied by courts where justice requires. Respondent fails to cite any section of the General Mining Law containing or referring in any way to this doctrine. That is because no such section exists. Instead, as this Court explained in United States v. Detroit Timber & Lumber Co., 200 U.S. 321 (1906), the "relation back" doctrine is a "fiction of law . . . resorted to whenever justice requires." Id. at 334-35. The Tenth Circuit's decision automatically applying relation back to invalidate key provisions of the oil shale settlement is inconsistent with Detroit Timber. See Petition at 13.

III. Conclusion

The Court should grant the petition for certiorari to address the important federal questions presented in the petition

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